Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

POLLY NELSON,

Petitioner,

v.

JOHN GRISHAM and
BANTAM DOUBLEDAY DELL
PUBLISHING GROUP, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 29, 1997

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QUESTIONS PRESENTED FOR REVIEW

I. In determining whether one literary work infringes the copyright of another, should the courts ignore all other evidence of copying and confine their inquiry to whether a defendant has copied "protectable" elements of plaintiff's work, a question as to which this Court has never spoken and as to which the Courts of Appeal are in conflict?

II. Should the "scenes a faire" doctrine be employed to protect copying of an unpublished literary work from the reach of the copyright laws, absent any showing that the descriptions or events for which protection is eliminated are necessarily or customarily encountered in similar works?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Polly Nelson respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

DECISIONS BELOW

On September 29, 1997, the United States Court of Appeals for the District of Columbia Circuit, *per curiam*, entered an order and judgment affirming without separate opinion a decision of the United States District Court for the District of Columbia. A copy of that unreported order is attached as Appendix A ("App. A"). The District Court's decision is reported at 942 F. Supp. 649 (D.D.C. 1996), and is attached as Appendix B ("App. B").

JURISDICTION

Petitioner Polly Nelson brought an action under the Copyright Act of 1976, *as amended*, 17 U.S.C. §§101 *et seq.*, seeking an injunction and damages arising from infringement of her copyright in a non-fiction work *Defending the Devil: My Story as Ted Bundy's Last Lawyer* ("*Defending the Devil*"). The infringement alleged was publication of *The Chamber*, purportedly a work of fiction written by Respondent Grisham and published by Respondent Doubleday.

On September 26, 1996, the District Court granted Defendants' Motion for Summary Judgment and entered a final order dismissing the case. (App. B) Nelson timely appealed that order to the United States Court of Appeals

for the District of Columbia Circuit. On September 29, 1997, that Court entered an order and judgment affirming the District Court's decision. (App. A) This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED IN THIS CASE

Section 102(a) of the Copyright Act of 1976, 17 U.S.C. §102(a), provides, in relevant part:

> "Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression . . . . Works of authorship include . . . literary works. . . ."

STATEMENT OF THE CASE

In 1989, Petitioner Polly Nelson began work on what would become *Defending the Devil.* Her book was a chronicle of her experiences and insights during her representation of Ted Bundy, a Florida death row inmate, particularly "her emerging understanding of how and why she had come to take on responsibility for what happened to Bundy in the first place."[1] Through her literary agent, Nelson circulated drafts of her book to certain potential publishers – including Respondent Doubleday.[2]

Finally published in July of 1994, *Defending the Devil*[3] sets out Nelson's unique experiences and reac-

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[1] R. 10, Edelstein Declaration ¶4. (Attached as Appendix D hereto is the district court's docket in this case. Citations to "R. #" herein are to the numbered entries in Appendix D.)

[2] R. 10, Edelstein Declaration ¶¶5-11, Nelson Declaration ¶3.

[3] *Defending the Devil,* in its published form, was Exhibit 1 to the complaint. A draft dated June 1993, the draft from which

[footnote continued]

tions to her infamous client, his violent history, her ambivalent colleagues and harsh adversaries, and the highly politicized justice system in which her battle was waged. She chronicles the drudgery, frustrations and loneliness that characterized her first and last case at her large law firm. She also charts a growing awareness of her own overdeveloped sense of responsibility and its roots in her dysfunctional family and dependent parents. Nelson's book, far from being a plodding procedural history of the legal issues raised by the Bundy case or a hackneyed example of a frequently-encountered literary genre, is in fact a personal sojourn, expressed through Nelson's original selection and sequencing of incidents and descriptive details. It is a young lawyer's exploration – in her own distinctive voice – of why she was destined to feel totally responsible for the life of a condemned villain. She begins the first chapter of her story with its central theme: "I was born to represent Ted Bundy."[4]

A few weeks before her publisher brought *Defending the Devil* to market, Respondent Doubleday published *The Chamber.*[5] In *The Chamber,* Respondent Grisham tells the story of a young lawyer (Adam) who, due to an overdeveloped sense of responsibility brought on by

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Nelson contends Grisham copied, is included in R. 15, and is identical to the published version in all material respects. (R. 15, Nelson Supplemental Declaration ¶6)

[4] Petitioner vehemently disagrees with a very puzzling reading of the concept and feel of her book by the district court. (App. B at 10a-15a) The issues raised by this Petition are wholly independent of this disagreement, however, and concern merely the appropriate legal standards under which to assess the sufficiency of evidence offered in support of a claim of copyright infringement.

[5] *The Chamber* was Exhibit 2 to the complaint.

a dysfunctional family and dependent parents, feels compelled to represent his long-lost grandfather, a death row inmate in Mississippi, who faces execution for a murder many years earlier. Adam has the same experiences, reacts in the same ways to his client, his colleagues and his adversaries, and suffers the same personal consequences as Nelson. Like Nelson, Grisham chronicles the drudgery, frustrations and loneliness that characterizes Adam's efforts, as well as his evolving insights into his own character and the history of his dysfunctional family.

Critics were virtually unanimous in noting how different *The Chamber* is from Grisham's previous novels with their "formulaic commercial approach to . . . legal thrillers aimed at a mass audience."[6] Several readers noticed how alike *The Chamber* is to *Defending the Devil.*[7] Nelson's counsel prepared a claim letter setting out many specific and gratuitous similarities and insisted that Grisham and Doubleday cease infringing Nelson's copyright in *Defending the Devil.* A copy of that claim letter is attached hereto as Appendix C ("App. C").[8] After Doubleday denied that Grisham had ever read or heard of *Defending the Devil,* Nelson filed this action in district court under the authority of 17 U.S.C. §501. The district court had jurisdiction pursuant to 28 U.S.C. §1338(a).

Before discovery was had, Grisham and Doubleday moved for summary judgment on the ground that, as a

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[6] R. 10, Jorgens Declaration ¶23 at 23; Opposition at 26-28 & notes 91-93, Appendix B.

[7] R. 20, Nelson Declaration ¶1.

[8] Petitioner respectfully requests that this Court review App. C for a succinct summary of the similarities between the two books.

matter of law, no actionable similarity exists between the works. (R. 5) In opposition, Nelson submitted an Appendix listing, in the form of nine Tables arranged by subject matter, 294 different instances where Grisham apparently copied from *Devil.* Those Tables quote excerpts of both books to facilitate comparison.[9] She also submitted a 30-page sworn opinion by an expert in narrative literature validating the Tables and independently describing the similarities between the two works,[10] along with other evidence of copying.

The district court granted summary judgment for defendants, holding that the only relevant issue is whether the material claimed to have been copied was sufficiently similar to "protected aspects of" *Defending the Devil* so as to constitute infringement, citing this Court's decision in *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) as support for its position. The district court narrowly defined what it considered "protected" by the Copyright Act, excluding consideration of many examples of copying by labelling them "scenes a faire" (stock scenes or events). Never deciding or even discussing whether Nelson's evidence had raised a genuine issue as to whether Grisham had in fact copied her book, the district court simply concluded that no reasonable jury could find the "protected aspects of" *Defending the Devil* "substantially similar" to *The Chamber.* (App. B at 16a)

The Court of Appeals summarily affirmed this decision "substantially for the reasons stated in the district court's memorandum." (App. A)

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[9]The Tables are included in R. 10. The method by which the Tables were prepared is described in the Nelson Declaration, also in R. 10.

[10]The Declaration of John Jorgens is also in R. 10.

REASONS FOR GRANTING THE WRIT

I.

THE COURTS SHOULD CONSIDER ALL EVIDENCE OF COPYING, NOT MERELY EVIDENCE OF COPYING OF "PROTECTABLE" MATERIALS, IN ASSESSING THE SUFFICIENCY OF CLAIMS OF COPYRIGHT INFRINGEMENT OF LITERARY WORKS.

As this Court has made clear, to establish copyright infringement, a plaintiff must show defendant's "copying of constituent elements of the work that are original." *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).[11] Since deliberate copying is usually surreptitious and well-concealed, Plaintiffs often make their *prima facie* case of copying by proving two things: that two works are "substantially similar" and that the defendant had access to plaintiff's work.[12] Yet no court limits potential proof of copying to these elements,[13] and Nelson presented much other evidence of copying that was ignored by the courts below.

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[11] Since Respondents conceded that Petitioner owned a valid copyright in *Defending the Devil* for purposes of their motion for summary judgment below (R. 5 at 18 & n.9), only copying was addressed by the District Court and only copying is relevant here.

[12] Respondents challenged Petitioner's evidence of access below and Petitioner invoked Rule 56(f) of the Federal Rules of Civil Procedure to seek discovery on this issue. (R. 5, 10) The district court apparently agreed that Petitioner was entitled to discovery on the question of access, but granted summary judgment anyway, holding that the issue of access is "ultimately irrelevant." (App. B at 6a). As discussed below, Petitioner contends that proof of access is highly relevant to a determination of both copying and substantial similarity.

[13] 4 M. Nimmer & D. Nimmer, *Nimmer on Copyright* (1997) ("Nimmer"), §13.01[B] at 13-10 – 13-13; A. Latman, "Probative Similarity" As Proof of Copying: Toward Dispelling Some Myths in Copyright Infringement," 90 Column. L. Rev. 1187 (1990) ("Latman") at 1194-95. *See, e.g., Alexander v. Haley*, 460 F. Supp. 40, 43-44 (S.D.N.Y. 1978).

Defendants faced with a claim of copyright infringement routinely attempt to limit inquiry into whether they have copied a plaintiff's work by moving for summary judgment on the ground that plaintiff's evidence of "substantial similarity" occurs outside the "protected elements" of plaintiff's work. There is a division of authority in the Circuits as to whether a court faced with such a motion must so confine its inquiry[14] and this Court has yet to state its views on that subject.

The courts below in this case joined the Seventh Circuit[15] and a recent decision of the Second Circuit[16] in restricting analysis to "protected elements" in assessing evidence of copying. Most other Circuits follow the approach favored by respected commentators[17] who argue that the better course is to examine the "substantial similarity" element of a plaintiff's *prima facie* case in two stages – first copying of the work and then infringement of protected material.[18]

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[14] As we show in Part II of this Petition, the district court in this case also unduly restricted what elements of a work of introspective non-fiction are "protectable" by an expansive and ill-advised adoption of the "scenes a faire" doctrine that would eliminate copyright protection to all but the most outlandish and irrational non-fiction works.

[15] *See Atari, Inc. v. North Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982).

[16] *Williams v. Chrichton*, 84 F.3d 581 (2d Cir. 1996).

[17] The seminal article on this topic is by the late Professor Alan Latman, a widely respected authority on copyright law. *See*, Latman, *supra* at 1194-95. *See also*, A. Broaddus, "Eliminating the Confusion: A Restatement of the Test for Copyright Infringement," in R. Thorne & J. Viera, eds., *Entertainment Publishing & the Arts Handbook* 1995-96 ed.

[18] A two-part analysis has been applied until recently in the Second Circuit, and also in the First, Third, Fourth, Eighth and

[footnote continued]

The first court to suggest a bifurcated approach was the Second Circuit in *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946). That Court described the first stage of the analysis as a determination, with the aid of detailed analysis ("dissection") and expert testimony, of whether similarities between two works are sufficient to prove *use of plaintiff's work in the creation of defendant's work*.[19] In other words, do the similarities between the two works, under all the circumstances, make independent creation unlikely and copying likely.[20] Only then does the trier of fact turn to an analysis of whether actionable copying (infringement) has occurred. Professor Latman explains the need for the first inquiry as follows:

> "Clues to copying may not pertain to copyrighted subject matter. The fact of *any* copying is what is at issue, at the first stage, because of the copying of uncopyrightable components of a work clearly has some probative value in establishing the copying

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Ninth Circuits. See e.g., *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995); *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 140 (2d Cir. 1992); *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606 (1st Cir. 1988); *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986); *Dawson v. Hinshaw Music, Inc.*, 905 F.2d 731 (4th Cir.), *cert. denied*, 498 U.S. 981 (1990); *Moore v. Columbia Pictures, Inc.*, 972 F.2d 939, 945-46 (8th Cir. 1992); *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990); *Sid & Marty Krofft Television Prods. Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977). These Circuits do not, however, always analyze each of the two stages in identical terms. See 4 Nimmer §13.03[E][1]-[3].

[19] The leading copyright textbook, adopting Professor Latman's views, calls this stage of the analysis a search for "probative similarity" to distinguish it from the subsequent analysis of "substantial similarity." 4 Nimmer, §13.01[B].

[20] Latman, *supra*, at 1214.

of other, copyrighted, components of the same work."[21]

The reasons why the two-step approach is preferable is well-illustrated by the present case. For by rushing to focus only on what it considered "protectable elements" at the urging of Grisham and Doubleday, the lower court failed to pay heed to much evidence probative of copying. For example, the district court did not even mention the fact that virtually every reviewer of *The Chamber,* writing long before this lawsuit, had commented on how different *The Chamber* is from Grisham's previous works.[22] These independent observations are circumstantial evidence that Mr. Grisham copied from a non-fiction work of a very different pace and substance than his usual action-packed thrillers. The district court also failed even to mention the many examples of words and phrases that appeared in *The Chamber* and also in *Defending the Devil,* but which had never before appeared in any other of Grisham's four previous novels.[23] In addition, the district court

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[21] Latman, *supra,* at 1195; *compare, Shaw v. Lindheim,* 919 F.2d 1353, 1362 (9th Cir. 1990) (although title is not copyrightable, proof of identical title is competent evidence of substantial similarity between two works); *Steinberg v. Columbia Pictures Indus., Inc.,* 663 F. Supp. 706, 711 & n.2 (S.D.N.Y. 1987) (although typeface is not copyrightable, similarity of typeface reinforces the impression defendant copied plaintiff's work).

[22] See R. 10, Appendix B.

[23] Rather than being expected because both books are about the death penalty and death row, most of these words and phrases are either idiosyncratic; used in lieu of Grisham's habitual patterns of expression; or simply used for the first time, despite the opportunity posed by similar situations in his previous books. Others of these words or phrases would be expected to have appeared previously, given the subject matter of Grisham's other books and his linguistic habits, but they do not and the fact that they do not

[footnote continued]

held that the question of whether Mr. Grisham had had access to a draft of *Defending the Devil* was "ultimately irrelevant" because of the controlling weight of its findings concerning lack of substantial similarity in protected expression. (App. B at 6a) It is difficult to comprehend how a trier of fact deciding whether or not Grisham copied Nelson's book could fail to be influenced by evidence that he in fact had a draft of Nelson's book in hand while writing *The Chamber.*

Most important of all, the one-step approach employed by the district court excluded from consideration as evidence of copying everything that the district court found to be "scenes a faire," which in its expansive reading of that doctrine turned out to be a large number of the examples of similarity advanced by Nelson. In fact, the court failed to cite any protected material, substituting an apparently blanket assessment that all similarities existed only in "unprotected elements." Because certain broad subject matters, e.g., "presence of the media" (App. B at 10a), was excepted, the court found specific expressions about that subject, no matter how unique or probative of copying, to be excluded too.[24] Had these – or some of them –

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provides additional documentary evidence of copying that was ignored under the district court's approach. Apparently the district court dismissed this evidence out of hand in deference to Respondents' position that mere words are not "copyrightable."

[24] Is it not relevant to an assessment of copying and substantial similarity that in both books the office support staff is shocked when the young lawyer refuses to return calls seeking interviews from major national publications? (R. 10, Tables, Row 7.17) So, too, by eliminating from its analysis as "stock events

[footnote continued]

been included in the district court's substantial similarity analysis, summary judgment for respondents would not have been granted.[25]

II.
THE COURTS SHOULD REJECT AN EXPANSIVE AND IRRATIONAL USE OF THE SCENES A FAIRE DOCTRINE WHEN TO DO OTHERWISE IS INCONSISTENT WITH THE COPYRIGHT ACT.

The District Court in this case held that proof of Respondents' copying of "protectable elements" of *Defending The Devil* – rather than their copying of "original" elements – is a necessary element of Petitioner's claim of copyright infringement, misquoting the

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and scenes" the "similar frenzy with which last minute appeals are made by each of the attorneys" (App. B at 10a), the district court simply ignored the copying of similar expression of those events such as the fact that, while anxiously awaiting for an imminent but delayed decision from the Court of Appeals, each lawyer feels suffocated in the office of his local counsel and rushes out onto the street in an attempt to relieve the pressure. (App. C at 50a-51a)

[25] If copied at all, Nelson's book was copied before it was published. Various courts have suggested that infringement in this situation requires a more vigorous enforcement of copyright standards. *See, e.g., Nash v. CBS, Inc.*, 899 F.2d 1537, 1541 (7th Cir. 1990) (in discussing a defendant's fictionalizing of plaintiff's historical theory: "Before the first book is published, broad protection of intellectual property seems best; after it is published, narrow protection seems best.") The courts in this case apparently gave no consideration to this factor. In the context of fair use of material subject to copyright protection, this Court has emphasized an author's legitimate and protected interest in deciding in what form and when to publish his personal observations interwoven with historical material. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-8 (1985). It was just this interest that was stripped from Petitioner. We submit that this fact may well justify a broader reading of copyright protection to those in Petitioner's situation than to those whose writings are already in the public domain.

holding of *Feist Publications v. Rural Tel. Serv. Co.* to support its conclusion. (App. B at 217-18 & n.1) In fact, this Court's definition of the second element of a copyright claim is derived from the language of the Copyright Act, which grants copyright protection only to "original works of authorship." 17 U.S.C. §102(a). This Court has never spoken to the question of what standards should be applied to determine what original expression is or is not "protected" expression in the case of original literary non-fiction,[26] and it has never addressed the merits or the scope of the judicially-developed "scenes a faire" doctrine that proved outcome determinative in this case.

For even if the courts below had been correct in concluding that only "protectable" elements should be compared in asssessing copying, we submit that the scenes a faire doctrine as applied by the district court is overly restrictive in defining what is "protectable." By this Petition, we ask that this Court intervene and set sensible limits on the scenes a faire doctrine which, as applied here, threatens to decimate copyright protection for non-fiction works.

In this case, the district court, reasoning that "often in non-fiction work there are many uncopyrightable elements," (App. B at 15a), simply went on to exclude from consideration as evidence of copying a vast percentage of Petitioner's proof, because, the Court asserted, various

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[26]Indeed, in the case of *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548 (1985), this Court described the law in this area as "currently unsettled":

> "Especially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression."

scenes, events and persons were "stock" or "expected in any book about the representation of a death row inmate," or even "easy to imagine in such an emotionally charged experience." (App. B at 10a, 14a) The district court took this position without any evidence that any other literary works dealing with a similar subject matter are in existence that contain the scenes, descriptions and persons in anything like the terms depicted by Nelson in *Defending the Devil.*

Many courts have held that so-called "scenes a faire" – defined as stock or standard literary devices without which it is "virtually impossible to write about a particular historical era or . . . theme" – are not protected by the Copyright Act.[27] Courts that have used that doctrine define it with remarkable uniformity to signify incidents, characters, settings or other sequences of events that *necessarily* follow from the idea or theme that two works have in common, or at the very least are standard in such stories.[28] Here, the lower court labeled certain areas of copying as "expected" or "easy to

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[27] The "virtually impossible" language is a direct quotation from the seminal case of *Hoe[illegible] Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980).

[28] *See, Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp.*, 672 F.2d 607, 616 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) (describing scenes a faire as "incidents, characters or settings which are as a practical matter *indispensable*, or at least standard . . . in the treatment of a given topic") (*emphasis added*); *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222, 1236 (3d Cir. 1986) ("[S]cenes a faire are afforded no protection because *the subject matter represented can be expressed in no other way* than through the particular scene a faire") (emphasis added); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976) (quoting Nimmer in defining scenes a faire as "[S]imilarity of expression . . . which necessarily results from the fact that the common idea is only capable of expression in more or less stereotyped form.")

imagine" in a book about representing a death row inmate, and disregarded them for this reason. (App. B at 10a, 14a). The district court made such pronouncements without any evidentiary predicate 1) that other, similar works exist, or, 2) if they do, that they contain all, most, or even some of the same expressions and events labeled scenes a faire and thus excluded from consideration as infringing Nelson's work by the courts below.[29] Neither the district court nor Respondents attempted such a showing.[30]

Even if this Court were to accept the scenes a faire doctrine as having some validity by excluding insufficiently original expressions from copyrighted status, this Court should require an evidentiary predicate for its application in order to prevent mass erosion of copyright protection. To assert that particulars of Nelson's work are scenes a faire and "not (or less) protected", one should be able to show that they are necessary elements

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[29] It could be said that almost everything that occurs in real life is imaginable. By not requiring evidence of similar works containing the same expressions, the district court was apparently taking bold judicial notice that if there were similar works, they would have necessarily contained the same expressions.

[30] Respondents did not do so, we suggest, simply because they could not. How many "death penalty books" could Respondents find where the law firm that employs the defense lawyer almost fires him or her in the midst of the case? How many where the lawyer-protagonist explores why he was fated at birth to represent the inmate? Even if aggressive press reporting were to be considered a stock theme in a book about the execution of an infamous criminal, it is in no sense necessary to a story about representing a condemned inmate that the inmate see a black member of the defense team, previously unknown to him, for the first time on television, or that the lawyer protagonist checks into a motel, turns on the television, and is bombarded by television reports concerning the client's imminent execution, with accompanying crass political posturing. (App. C at 13a, 22a-23a, 39a, 36a, 56a-57a)

of the sort of story Nelson tells, and not simply by ruminating about what one would "expect" or "imagine" in a hypothetical similar story.[31]

Failures to set the types of limits we suggest on use of the scenes a faire doctrine will have particularly disastrous effects on authors of introspective non-fiction. For to the extent authors of those works express themselves by recounting events that actually occurred or describe real people, they will be subject to the argument that these events and people – and the reactions they generate in the narrator – are to be expected in the described environment. Yet it is often precisely through the selection and juxtaposition of ordinary details that diarists and the authors of personal memoirs or autobiographies tell their stories and shape their messages. Unless the scenes a faire doctrine is limited, only those authors who write about the truly bizarre and outlandish will be protected by the copyright laws. Even those like Polly Nelson who write of unusual experiences will be subject to a defense that " it can be expected" or even "imagined" that they might encounter certain personalities, settings and emotions in the events about which they write. We respectfully suggest that this Court fashion limitations on the scenes a faire doctrine that ameliorate this danger in order to preserve the purposes of copyright protection.

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[31] Many reported cases employing the scenes a faire doctrine seem to involve a recognizable genre. *See, e.g., Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986) (cop story); *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327 (9th Cir. 1983) (science fiction piece); *Alexander v. Haley*, 460 F. Supp. 40 (S.D.N.Y. 1978) (story about slavery).

III.

THE ISSUES PRESENTED BY THIS PETITION ARE IMPORTANT ONES, RIPE FOR INTERVENTION BY THIS COURT.

At oral argument in this case in the Court of Appeals, counsel for Respondents attempted to put the present case into context with other copyright claims. His words were blunt and to the effect that unknown writers bring copyright claims against well-known, successful authors all the time, and that these cases are invariably dismissed on summary judgment.

Counsel's second observation is basically accurate, for most copyright cases are dismissed before trial, especially in Circuits that focus only on substantial similarity of "protected" aspects and that allow expansive use of the scenes a faire doctrine. The well-organized and amply-financed bar representing the publishing industry has been successful in developing and advocating these limitations on copyright protection in its clients' interest.

This case presents a clear opportunity for this Court to revive copyright protection and restrict the usually fatal research of two of these limiting devices. Maybe some, many or even most of the unknown writers mentioned by counsel had no viable copyright claim. But given the economics involved in launching and sustaining a copyright claim against well-financed adversaries,[32] it seems unlikely that all or even most of the authors whose claims have been dismissed in the face of the

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[32] Following the order affirming its decision by the Court of Appeals, the district court entered an order awarding Respondents their reasonable attorneys fees in this case. Respondents have requested fees and costs in excess of $100,000, representing that amount to be one-half of their actual reasonable fees and costs.

"protected elements" limitation or in light of an expansive reading of the "scenes a faire" doctrine had no basis for bringing their claims. The fact that they "invariably" lose on summary judgment is an indication that the standards that are being applied in copyright cases around the country are in immediate need of guidance from this Court in its dual role of guardian of rights rooted in federal legislation and in its supervisory role assuring uniformity in enforcement of those rights among the Circuits.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 29, 1997

APPENDIX A

Polly NELSON,

Plaintiff,

v.

John GRISHAM, et al.,

Defendants.

Civil Action No. 95-0149 (RCL).

United States District Court,
D. Columbia.

September 26, 1996.

Patricia D. Douglass, Washington, DC for plaintiff.

Bruce W. Sanford, Belinda J. Scrimenti, Henry S. Hoberman, Baker & Hostetler, Washington, DC, for defendants.

MEMORANDUM OPINION

LAMBERTH, District Judge.

This case comes before the court on defendants' motion to dismiss or, in the alternative, for summary judgment. Upon consideration of the parties' submissions and the relevant law, for the reasons set forth below, the court will grant defendants' motion for summary judgment.

I. Background

Plaintiff Polly Nelson has sued defendants John Grisham and Bantam Doubleday Dell Publishing Group,

Inc., alleging copyright infringement arising under the Copyright Act of 1976, as amended, 17 U.S.C. §101 *et seq.* Plaintiff contends that Grisham copied her book, *Defending the Devil: My Story as Ted Bundy's Last Lawyer,* when Grisham wrote his novel, *The Chamber.* In response, defendants have moved for dismissal on the ground that the complaint does not properly allege that defendant Grisham had access to plaintiff's protected work, a necessary element of copyright infringement. In the alternative, defendants have moved for summary judgment on the ground that the books are not substantially similar, again a necessary element of copyright infringement. Before a discussion of the legal issues, a brief synopsis of each book is appropriate.

A. *Defending the Devil: My Story as Ted Bundy's Last Lawyer*

Nelson has memorialized her three-year-long involvement in the representation of death row inmate Ted Bundy in *Defending the Devil.* After a brief description of her floundering path to the Washington, D.C. law firm Wilmer, Cutler & Pickering, Nelson tells how she received the Bundy case when she accepted it as a diversion from her normal regulatory work at the firm. She proceeds to describe three years of legal work on the Bundy case, including the appeals process, habeas corpus proceedings, scrambles for stays, her interaction with others in the firm, and the affect the work and publicity had on her personal and professional life.

In the Bundy habeas corpus litigation, the primary issue addressed by both the courts and the attorneys was the question of Bundy's competency to stand trial. This issue is also the primary focus of Nelson in her book. Nelson outlines in great detail the process of writing the appellate briefs, finding, interviewing, and preparing wit-

nesses as well as convincing Bundy that their best chance of success involved the competency issue. An example of the incredible significance placed on this issue by Nelson is the approximately 100 pages of her book which are lifted from the transcript of the federal district court evidentiary hearing on Bundy's competency.

B. *The Chamber*

The Chamber is the fictional story of Adam Hall's attempt to discover his hidden past through the last minute representation of his grandfather, Sam Cayhall. In 1967, Cayhall was involved, with two other men, in the bombing of a Jewish attorney's office. While Sam had thought the bomb was to go off in the middle of the night, in fact his accomplice had added a timing device so that it detonated when the attorney was in the office with his twin sons. The boys were killed instantly, and the attorney suffered injuries to his legs that resulted in both being amputated.

Sam was arrested that very day, and soon charged with capital murder for the bombings. However, his first two trials both ended in mistrials, and it was not until 1981 that he was convicted and sentenced to die in the gas chamber. Nine years passed, and the appeals process has almost run its course. Enter Adam Hall, 26 year-old grandson of Sam. In 1967, just after Sam's arrest, Adam's father had taken his family away from Mississippi and fled to California. Adam and Sam had not communicated with each other since Adam was three. In fact, Adam did not learn of his infamous grandfather until after his father died when Adam was only 16.

The Chamber tells the story of Adam and Sam's relationship in the month leading up to Sam's execution. It describes the legal appellate process, but also the exploration process of Adam as he discovers the history of his

grandfather, father, and aunt. Together, Sam and Adam grow as their relationship develops and Adam fights to prolong Sam's life.

II. Analysis

A. Legal Standard

Defendants have moved the court to dismiss this case under Rule 12(b)(6) arguing that under no set of facts can plaintiff prove that Grisham had access to the protected writings of Nelson and, in the alternative, for summary judgment on the issue of substantial similarity. However, because both parties have submitted evidence regarding access that is beyond the scope of the complaint, the court will treat the entire motion as one for summary judgment as provided by Rule 56.

Summary judgment is appropriate where there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Inferences drawn from the facts must be viewed in the light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). If summary judgment is to be denied, there must be evidence on which the jury could reasonably find for the non-moving party. *Anderson v. Liberty Lobby,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986). If the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment may be granted. *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552.

B. Access

To establish copyright infringement, two elements must be shown: (1) ownership of a valid copyright, and (2) copying of protectable elements of the copyrighted work. *Feist Publications v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 1295-96, 113 L.Ed.2d 358 (1991). Because plaintiffs can rarely provide direct evidence of copying, plaintiffs can raise the inference of copying by demonstrating that the alleged infringer had access to the protected work and that the works are substantially similar. *McCall v. Johnson Publishing Co.*, 680 F.Supp. 46, 48 (D.D.C.1988).

With regards to access, this is an unusual case in that *Defending the Devil* was published after *The Chamber.* Plaintiff alleges that Grisham copied from earlier drafts, as opposed to the final published version. It is undisputed that a 1989 proposal for *Defending the Devil* was sent to sixteen publishing houses. It is not evident if Doubleday, Grisham's publisher, was one of these sixteen. However, it appears undisputed that plaintiff submitted a 68 page proposal and draft to Doubleday publishers in 1990. Because Doubleday serves as Grisham's publisher, plaintiff wishes the court to infer that the proposal was passed around at Doubleday and eventually landed in the hands of Grisham. Furthermore, plaintiff has alleged that Grisham was exposed to a complete draft, which was completed in 1993. Plaintiff has presented no direct evidence that Doubleday ever had possession of this draft. Instead, plaintiff asks the court to infer that Doubleday had access because in the publishing industry, unpublished manuscripts are often circulated. To refute this inference, defendants have produced affidavits from Grisham and others at Doubleday who deny ever having read the proposal. As weak as the suggested inference is,

summary judgment on the issue of access would be inappropriate at this time, before completion of discovery. But, plaintiff's case fails for another reason making the question of access ultimately irrelevant. *See McCall,* 680 F.Supp. at 48.

C. Substantial Similarity

As stated earlier, copying of protected works is a required element of copyright infringement.[1] Because direct evidence of copying is often difficult to find, plaintiffs can raise the inference of copying by showing both access and substantial similarity. Defendants argue that because these two books are not substantially similar, copyright infringement cannot be proven. When substantial similarity is an issue, summary judgment for a defendant is "appropriate where the works are so dissimilar that a claim of infringement is without merit." *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1330 (9th Cir.1983). Or, as the Second Circuit has stated, "when no reasonable trier of fact could find the works substantially similar." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir.), cert. denied, 476 U.S. 1159, 106 S.Ct. 2278, 90 L.Ed.2d 721 (1986).

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[1] Plaintiff has asked the court to compare the two works in their entirety to determine if Grisham copied *Defending The Devil,* and, if the answer is yes, to then determine if the copying was of protectable or unprotectable elements. However, this is not the approach of the Second Circuit, which is by far the most experienced in matters of copyright infringement. Courts are to limit their inquiry to determine whether "the protectable elements, standing alone, are substantially similar." *Williams v. Crichton,* 84 F.3d 581, 588 (2d Cir. 1996) (quoting *Knitwaves, Inc. v. Lollytogs, Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)). The court adopts the approach of the Second Circuit, confident in its belief that this is the law. Having said this, it is important to note that the court does address the general concept and feel of each book in its entirety, and concludes that the two works are very different.

Copyright protection "does not extend to ideas; it protects only the means of expression employed by the author." *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2d Cir. 1994). Judge Learned Hand articulated the guiding principle in applying this concept that is much easier stated than used:

> upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the general statement of what the play is about, and at times consist of only its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir.1930), cert. denied, 282 U.S. 902, 51 S.Ct. 216, 75 L.Ed. 795 (1931). Thus, "the focus must be on the similarity of the expression of an idea or fact, not on the similarity of the facts, ideas, or concepts themselves." *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir.), cert. denied, 506 U.S. 934, 113 S.Ct. 365, 121 L.Ed.2d 278 (1992). And while an alleged infringer cannot prove his innocence by pointing to the differences in his work, "numerous differences tend to undercut substantial similarity." *Warner Bros. Inc. v. American Broadcasting Co.*, 720 F.2d 231, 241 (2d Cir.1983).

The plaintiff has submitted over 100 pages of charts created by herself that she argues document many similarities between the two books. Additionally, she has submitted a lengthy declaration of Jack Jorgens as an

expert witness and both parties have submitted numerous critical reviews of both works. However, for several reasons, the court does not place much significance on these materials in reaching its decision. First of all, in any case involving substantial similarity, the actual texts are the relevant evidence. "Comparison of secondary or descriptive materials cannot prove substantial similarity under the copyright laws." *Walker,* 784 F.2d at 51. Second, with regards to the declaration of Jack Jorgens and the other critical analyses, expert testimony is not relevant in a case such as this when the question of substantial similarity "depends on the observations of the 'ordinary reasonable person.'" *McCall,* 680 F.Supp at 48 (quoting *Sid and Marty Krofft Television Productions, Inc. v. McDonald's Corp.,* 562 F.2d 1157, 1164 (9th Cir. 1977)).[2] And, having examined the charts produced by Nelson, the court questions their usefulness as many of the textual examples appear to be taken out of context and in fact allege similarity when there is none to be found. For example, row 107 asks the court to consider the similarity between two sentences in *The Chamber* found on pages 43 and 48 with a paragraph from *Representing the Devil* found on page 158. In *The Chamber,*

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[2]In the Second Circuit, the standard "ordinary reasonable person" test has been modified by some courts because of a belief that the concept of substantial similarity is not one known to the public at large. Thus, substantial similarity is a "term to be used in a courtroom to strike a delicate balance between the protection to which authors are entitled under an act of Congress and the freedom that exists for all others to create their works outside the area protected against infringement." *Warner Bros. Inc. v. American Broadcasting Co.,* 654 F.2d 204, 207 (2d Cir. 1981). Because of this, the court is not rejecting as irrelevant the declaration of Jack Jorgens. But, the court questions the many conclusions reached by Jorgens, and therefore has focused on the actual texts of the two books.

Adam is viewing a videotape that he had spent seven years making. The videotape pieces together the legal trials of Sam from the day of the crime to the present day. In *Representing the Devil,* Nelson had just spent part of an unsuccessful day with her supervising attorney looking for footage of her client's trial. They were unsuccessful because they could only locate brief excerpts. The only apparent similarity between the indicated passages is that they both involve videotapes of the attorney's clients. When the passages are examined, it is clear that they are not similar and that they serve very different purposes. In *The Chamber,* Adam had spent years creating this videotape of Sam in an attempt to learn everything he could about his grandfather. Grisham uses the making of the tape as a device to show Adam's intense fascination with his recently discovered past. In contrast, Nelson and her boss had spent a few hours at the end of a day looking for the tapes in hopes that they could be used as evidence. The search for the tapes is just another example of the effort exerted by Nelson to help Bundy on a day-to-day basis.

Additionally, many of the scenes and descriptions pointed to in the tables, even if they are similar, are "scenes a faire", which are not copyrightable. Scenes a faire are "sequences of events that 'necessarily result from the choice of a setting or situation' [and] do not enjoy copyright protection." *Williams,* 84 F.3d at 587 (quoting *Walker,* 784 F.2d at 50). In *Walker,* the works involved in the infringement dispute were a book and a movie about police work in New York City. In finding that almost all similarities between the two books involved unprotectable materials, the Second Circuit concluded that elements such as "drunks, prostitutes, vermin and derelict cars would appear in any realistic

work about the policemen in the South Bronx." *Walker,* 784 F.2d at 50. Similarly, foot chases and the morale problems of cops are stock themes in police fiction and are unprotectable as well, except to the extent that they are given unique expression. *Id.* Nelson has alleged as similarities in each of the books the presence of the media, politicians, and jail house personnel. Furthermore, she points to the similar frenzy with which last minute appeals are made by each of the attorneys. But, these are all stock events and scenes that are expected in any book about the representation of a death row inmate. And, because Grisham did not copy any unique expressions of Nelson, there is no infringement.

a. Concept and Feel

In determining substantial similarity, courts must consider both the works as a whole and their individual parts. Explaining the need for this, the Second Circuit stated that "just as similarity cannot be rejected by isolating as an idea each characteristic the characters have in common, it cannot be found when the total perception of all the ideas as expressed in each character is fundamentally different." *Warner Brothers,* 720 F.2d at 243.

The concept and feel of the two books are very different. *Defending the Devil* is non-fictional account of Nelson's attempt to save Bundy from the electric chair. She believed that there was a valid error in each of Bundy's trials that should be addressed on appeal, and *Defending the Devil* is about her fight to have his convictions overturned. There is no suspense or surprise about the eventual outcome as the first page in the book is a newspaper account of Bundy's execution. Many pages of the book consist of testimony from the district court and appellate proceedings, lifted straight from the transcripts

as if Nelson wishes to also convince the reader of the validity of Bundy's claim. While the case undoubtedly had an effect on Nelson's personal life, her personal growth and whatever relationships that might have developed as a result of her representation are not the focus of the book.

In contrast, *The Chamber* is novel that tells a much more personal story. While the reader learns about Adam's legal representation of Sam, this is not the reason for the story, or for the actions of the characters. Even though he does not like it, Adam knows that there are probably not any viable issues left in Sam's case, and although he wants to represent Sam in order to help him legally, it is to help him in other ways as well. Adam wants Sam to know that he has family, and Adam wants to learn about his familial history. Adam's legal representation of Sam is the vehicle for the character development of each.

b. Plot, Setting, and Time Line

The setting of each book is different. In *Defending the Devil,* the majority of the action takes place in Washington, D.C., the location of Nelson's law firm, and in Florida, where Bundy was eventually executed. In *The Chamber,* most of the action takes place in Chicago and Memphis, the location of Adam's legal offices, and in Mississippi, where Sam is in prison. The choice of Mississippi is an important one for *The Chamber,* as the southern state provides the backdrop for the racial issues that led to Sam's decision to participate in the bombings. His southern upbringing influenced him greatly, and it is this part of his heritage that Adam wishes to explore. Additionally, the choice of Mississippi allowed Grisham to draw comparisons between the state's politics and those of Texas and Florida, two southern states that lead

all others in the number of executions that take place every year.

While the southern backdrop does play a significant role in *The Chamber,* plaintiff is right that much of the action in both books takes place in offices, courtrooms, prisons, and hotels. Plaintiff argues that the descriptions of these settings are "remarkably similar." However, the court finds this statement to be inaccurate. And, the similarities that do exist are not copyrightable as they consist of descriptions that are too general to be deserving of copyright protection. *See Hoehling v. Universal City Studios,* 618 F.2d 972, 979 (2d Cir.1980).

The plot and time line of the books are also very different. Nelson covers a three-year period in her book while the action in *The Chamber* takes place in only one month. While *Defending the Devil* opens with Bundy under an execution warrant, it is a first execution warrant and there is little question that a stay will be granted. And, Nelson takes the reader through three years worth of appeals, from the daily grind of working on a capital case to the actual court hearings. In stark contrast, *The Chamber* does not have the same day-to-day-grind, but only intense activity as when the book opens, Sam is under an execution warrant that most do not expect to be stayed.

c. Characters

Plaintiff argues that Adam and Nelson are substantially similar characters. And, if plaintiff's characterizations of the two protagonists were accurate, there might be some validity to this argument. But, in fact, the protagonists are portrayed very differently in the two books. Admittedly, both are recent law school graduates who, as associates in large law firms, represent death row inmates. But, the similarities end there. Even though she claims to

have been born to represent Ted Bundy, in reality Nelson was asked to take the case simply because she was the closest associate still in the office late one evening. *Defending the Devil* at 20. And, in the book Nelson did not originally accept the case because of a deep need to help others as she has alleged in her brief, but because the pro bono case was "[a]nother diversion from the work at hand, like manna from heaven." *Defending the Devil* at 19. Several times in the book, Nelson recounts how she asked to be let off of the case, but is refused each time. Nelson may have been stuck with the Bundy litigation, but it was not just her inner turmoil that led to this situation.

In stark contrast, Adam was in the midst of multi-year plan when he asked to become involved in the representation of his grandfather, Sam Cayhall. Adam became a lawyer because of a longing to help his grandfather. He chose his law firm because of their past representation of his grandfather. In contrast, Nelson chose her law firm because she was suspicious of the fun she had encountered at her other place of legal employment. *Defending the Devil* at 16.

Plaintiff argues that both attempt to avoid the realities of the crimes their clients committed. And Nelson does avoid looking at pictures of Bundy's victims for a very long time. But, very early in *The Chamber*, Adam is seen replaying a tape he has created that tells of the many trials of Sam Cayhall. And, instead of ignoring the victims, there is what Adam describes as a "pitiful accident" that involves one of Cayhall's victims who lost both of his legs due to the bombing. And, instead of skipping over the scene, Adam discusses how he first had tears when he watched the scene, but has seen it so many times that tears are no longer possible. *The Chamber* at 49. And, unlike Nelson who does not even indirectly

discuss Bundy's crimes with him until nine months after her involvement began, *Defending the Devil* at 127, Adam has only been with Sam for approximately four to five minutes when he asks him point blank if he admits to killing his victims. *The Chamber* at 78.

Plaintiff also argues that both protagonists experience many of the same emotions, such as anxiety, protectiveness, hatred, and exhaustion. Certainly most who represent prisoners who face execution experience anxiety and exhaustion. And, protectiveness and hatred are easy to imagine in such a emotionally-charged experience as each protagonist has. Thus these are stock themes that cannot be accorded copyright protection. *Walker*, 784 F.2d at 50.

Plaintiff has also argued that the two inmates, Sam and Ted, are similar characters. Again, a reading of the two books does not support this argument. Sam was the lookout man in a series of crimes against Jewish Southerners who were targeted because of their aid to blacks and the civil rights movement. Except for a last ditch attempt to stay the execution, there was never any question regarding Sam's mental state or competency. He participated in his crimes because of racial hatred.

In contrast, Bundy was a serial killer who attacked, raped and murdered women. Through his entire involvement with the legal process, there was always a question about his competency, and Nelson focused on this throughout the book.

Nelson also argues that the two inmates are described in similar ways. At one point or another, both are resigned, ready to argue anything, and ready to argue nothing. But, again, these conflicting emotions are ones the court would expect from a death row inmate facing an impending execution, and because Grisham did not

copy any unique expression of these ideas, there is no infringement. And, again, many of the alleged similarities are simply not similarities. For example, in each book both Sam and Ted are described as considering themselves "invincible." However, the reasons that each considers himself to be incincible only illustrate how very different the two characters are. Early in *The Chamber,* Sam considers himself invincible when he has successfully completed a number of bombings without being caught. *The Chamber,* p. 5. Later, he considers himself to be invincible because he has been through two trials, and the state is unable to convict him. *Id.* at 106. In contrast, Ted is described as acting as if he is invincible as a result of his mental illness, not because of external factors that he thought demonstrated the state's inability to convict him. *Defending the Devil,* p. 152.

Plaintiff has expressed concern that a ruling against her will be a dangerous acknowledgment that those who write their own memoirs cannot expect to receive protection from the copyright laws. The court responds in two ways, as the Second Circuit did in *Williams v. Crichton.* In that case, the plaintiff was an author of children's books, and was concerned about the level of protection that he was receiving under the copyright laws. In answering this concern, the court stated that "the copyright law is to be uniformly applied across a variety of media and audiences." *Williams,* 84 F.3d at 590. Just as children's literature receives equal protection under the copyright laws, so does non-fiction work. But this protection does not change the fact that often in non-fiction work there are many uncopyrightable elements. The court recognizes that *Representing the Devil* is about more than just Bundy's life. In parts, Nelson has injected her personal experience as well, and her expression of her experiences receives protection under the law. But, giving her this

protection does not give her the right to claim a monopoly on the stories of young attorneys who represent inmates on death row. And, giving her this protection cannot create substantial similarity where none exists. It is most important to point out that her claim fails because the two works are not substantially similar. An exhaustive examination of both books leads the court to conclude that no reasonable trier of fact could conclude that the two works are substantially similar.

III. Conclusion

Because of the factual nature of substantial similarity, courts have at times hesitated to grant summary judgment. *See Hoehling v. Universal City Studios,* 618 F.2d 972, 977 (2d Cir.), cert. denied, 449 U.S. 841, 101 S.Ct. 121, 66 L.Ed.2d 49 (1980). However, as the Second Circuit has stated, the use of summary judgment is "an important development . . . permitting courts to put 'a swift end to meritless litigation' and to avoid lengthy and costly trials." *Hoehling,* 618 F.2d at 977 (2d Cir.), (quoting *Quinn v. Syracuse Model Neighborhood Corp.,* 618 F.2d 438, 445 (2d Cir.1980)). Summary judgment is appropriate in this case because the claim of infringement of the plaintiff is meritless.

A separate order shall issue this date.

ORDER

For the reasons expressed in the Court's accompanying Memorandum Opinion, it is

ORDERED that defendants' Motion for Summary Judgment is GRANTED, and it is further

ORDERED that this case is DISMISSED.

SO ORDERED.

APPENDIX B

[Filed SEP 29 1997]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1997

(95cv00149)

No. 96-7235

POLLY NELSON,
Plaintiff-Appellant

v.

JOHN GRISHAM; BANTAM, DOUBLEDAY,
DELL PUBLISHING GROUP, INC.,
Defendants-Appellees

Appeal from the United States District Court for the District of Columbia

Before Williams and Randolph, *Circuit Judges*, and Buckley, *Senior Circuit Judge*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and oral arguments of counsel. After full review of the case, the court is satisfied that appropriate disposition of the appeal does not warrant an opinion. *See* D.C. Cir. R. 36(b). Accordingly, it is

ORDERED AND ADJUDGED by the court that the district court's decision be affirmed substantially for the

reasons stated in the district court's memorandum opinion in *Nelson v. Grisham*, 942 F. Supp. 649 (D.D.C. 1996).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

PER CURIAM

For the Court:

/s/ Mark J. Langer
Mark J. Langer, Clerk

APPENDIX C

PATRICIA D. DOUGLASS
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December 30, 1994

Bantam, Doubleday, Dell
Publishing Group, Inc.
1540 Broadway
New York, New York 10036
ATTN: General Counsel

Mr. John Grisham
c/o Bantam, Doubleday, Dell
Publishing Group, Inc.
1540 Broadway
New York, New York 10036

Re: *The Chamber/Defending the Devil*

Dear Sirs:

I have been retained by Polly Nelson to prosecute a claim for infringement of copyright and related claims arising from publication of Mr. Grisham's novel *The Chamber.* In *The Chamber,* Mr. Grisham has unlawfully appropriated the plot, characters, descriptions, and personal introspection found in Ms. Nelson's non-fiction book *Defending the Devil: My Story as Ted Bundy's Last Lawyer* (Morrow, 1994; the "*Devil*"). By so doing, Mr. Grisham has also wrongfully appropriated Ms. Nelson's life story, which she was privileged to market for her economic benefit.

It is immediately obvious on reading the two works that each tells exactly the same story—the tale of a new lawyer in an establishment law firm who, to meet her or his own personal needs, volunteers to take on the representation of the most notorious killer on death row. The inmate faces execution within a few weeks. The young lawyer immediately becomes heavily invested in the case, and struggles against the legal system determined that the condemned inmate should die at the scheduled hour. She and he must also contend with state politics; the politics of her/his law firm; a restless, marginally cooperative client unwilling or unable to inspire a sympathetic response; and relentless press efforts to sensationalize the story. In the end, the client is executed, the politicians rejoice, and the shattered lawyer immediately leaves the firm.

Below we set out at some length our preliminary analysis of some of the striking similarities between the two books. As attachments we include a side-by-side comparison of a number of very similar passages. We have cited to specific page numbers of each book to facilitate your review of our conclusions, except when the bases for our observations are obvious. We have shared our analysis in this depth in the hope that you will devote the serious attention to our claim that will permit it to be resolved short of litigation. Careful study of the points we raise, which are certainly not all of those we would expect to raise at trial, can lead to no other conclusion than that Mr. Grisham in fact based his work on Ms. Nelson's book, blatantly appropriating both grand themes and small details, and that his attempts to disguise this appropriation will be readily exposed.

CHARACTERS

Most of the characters appearing in *The Chamber,* major and minor, have direct counterparts in the *Devil.* In many other cases, either traits of one character in the *Devil* are split between two characters in *The Chamber,* or one character in *The Chamber* takes on traits of two or more characters in the *Devil.* Several examples follow:

The Young Lawyer Protagonist. In *The Chamber,* Adam Hall is a newly graduated lawyer, the editor of his Midwestern law school's law review, who has been working for nine months at a prosperous, business-oriented, metropolitan law firm. In the *Devil,* Polly Nelson is a newly graduated lawyer, the editor of her Midwestern law school's law review, who has been working for three months at a prosperous, business-oriented, metropolitan law firm. Each protagonist earns a healthy professional salary but chooses, from inertia or emotional vacuum, to live in surroundings unequal to her/his status in life (a converted warehouse/skin care salon), too paralyzed by the demands of their work at the high-pressure law firm to look for a new place to live.[1] Neither has a sex life, or any personal life at all. Both plan to work at the law firm for only a couple of years and then move on to do what they *really* want to do.[2] Both take on—as the first case for which they take primary responsibility—the cause of defending an inmate sentenced to death in a Southern state.

Each is simultaneously naive and dedicated. Both come from modest backgrounds and are openly awed at the travel and fringe benefits provided by their law firms.[3]

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[1] *Chamber* 46-47, *Devil* 59-60

[2] *Chamber* 31, *Devil* 20, 116

[3] *Chamber* 307, 315, *Devil* 29, 49, 270

Both grew up feeling overly responsible, due to dependent and "unhappy" parents; both were "born" to represent this particular inmate.[4] Each confesses to being excited/intoxicated by the life-and-death nature of the case.[5] Neither can believe that her/his law firm is not wholly supportive of all necessary efforts to halt the execution.[6]

Both young lawyers struggle to regard their clients with sympathy and to avoid thinking about the crimes for which they face execution. Despite these efforts, Adam and Polly cannot help but feel empathy for the ethnic/gender group the inmate targeted for murder; both suffer intermittent bouts of internal rage directed at the inmate and wonder if they should be representing him.[7] Neither feels he/she can give up on the case. Both fight through a haze of exhaustion to save the inmate's life, and both lose. Neither attends the execution. Both become disillusioned about the law; the relationship between each and his/her law firm deteriorates badly. Both unhappily leave their firms promptly after the execution.[8]

Both Adam and Polly feel a moral calling—even a compulsion—to represent the condemned inmate, a calling they only superficially understand at the outset, a calling

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[4] *Chamber* 30-31, 33-34, 52-54, 56-58, 103-07, 207-14, 245-48 250-51, 328, 411-12, 473-74, *Devil* 13-17, 26-27, 34-35, 44-45, 58, 59, 63-64, 69, 70, 73, 98-99, 116-18, 128-29, 137, 138, 151, 174, 274-75, 315

[5] *Chamber* 354, *Devil* 29

[6] *Chamber* 233, *Devil* 80, 115, 128-29

[7] *Chamber* 120, 129-32, 195-97, 206-10, 214-15, 222, 254-61 269, 281-82, 301-05, 393, 467-68, 473, *Devil* 54, 61, 66-67, 69-70, 72-73, 95-96, 127, 257-59, 319

[8] *Chamber* 41, *Devil* 9-10

that appears, at least at first, to conflict with their best interests.[9] The gradual illumination of this calling provides a plot running parallel to the prisoner's steady march towards execution.

Polly has other dimensions, however, that Mr. Grisham has displaced onto the character of Lee Cayhall Booth. Both *Lee* and Pol-*lee* are alcoholics who are at risk of relapse under the emotional burden of the pending execution.[10] Both are also compulsive social workers, seeking gratification from the belief that others need them.[11]

The Prosperous Law Firm Employing the Protagonist. Kravitz & Bane and Wilmer Cutler & Pickering both advertise a commitment to *pro bono* work, which is one reason the protagonists, with many offers to choose from, landed at those firms.[12] It turns out that this commitment is sorely tested when the *pro bono* case taken on by a young associate becomes an all-consuming, very expensive, very public crusade to halt the execution of the nation's most despised villain.[13] Most partners at the firm are late in learning that the firm in fact has taken on this notorious case; when they learn of it, they see it as an unpalatable burden about which nothing can be done.[14] In both firms, those partners who direct associates in *pro bono* projects apparently have limited abil-

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[9] *Chamber* 30-31, 223, *Devil* 13-17, 26-27

[10] *Chamber* 161-62, 260, 262, 263-64, 267-69, 283, 300-02, 304 306, 323, 329, 331-32, 483, *Devil* 14-15, 17, 44-45, 140-42, 151, 174, 314-15

[11] *Chamber* 157-59, 267-68, *Devil* 14-15, 17, 20, 22-23, 26-27 67, 138

[12] *Chamber* 23-26, *Devil* 16-17, 62-63, 117-18

[13] *Chamber* 37-41, 100-03, 232-39, *Devil* 80, 82-83, 115, 12021, 128-29, 143

[14] *Chamber* 240, *Devil* 21

ity or desire to protect them from the resentment and retaliation of other, less generous partners.[15]

For example, Daniel Rosen plays the same role in *The Chamber* as do the insurance partner who is angry at Polly for neglecting his work and the unnamed managing partner who ultimately fires her.[16] All three of these partners come to believe that the protagonist has come to the firm only to exploit its support for *pro bono* work.[17]

Both firms reluctantly expend grand sums (in excess of $2 million in *The Chamber* and $1.5 million in the *Devil*) on this one case.[18]

The Partner Supervising the Protagonist. Each protagonist is nominally supervised and supported by a partner with *pro bono* and death penalty experience. Both Garner Good*man* and Jim Cole*man* are cool, wise and dependable, managing to stay aloof and detached from the emotional fray attendant on an impending execution. Each also seems to stand somewhat apart from his partners at the firm, limiting his practice to *pro bono* matters, or at least supervising more such cases than other partners.[19] Each stays in the background of the inmate's case as much as possible and actively participates only as an execution date draws near.[20] Neither

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[15] *Chamber* 36-41, 103, 232-39, *Devil* 63-64, 112-13, 128-29 174, 253

[16] *Chamber* 233, *Devil* 128-29, 9-10

[17] *Chamber* 36-41, 233-38, *Devil* 9-10, 21, 128-29

[18] *Chamber* 28, *Devil* 120-21, 328

[19] *Chamber* 24, *Devil* 63

[20] *Chamber* 24-26, 31, 35-42, 347-49, 350-53, 355-59, 360 364-65, 378-80, 386-87, 417-19, 435-36, *Devil* 28, 43, 62-64, 71, 112, 123-24, 133, 137, 139-40

takes the pressure off the young protagonist to any significant extent, and spends time being chummy with the death penalty community.[21] This partner and the young lawyer have a formal, distant, respectful relationship, free of disagreements but also free of any real emotional connection.[22]

The Condemned Inmate. Both Sam and Ted are the most famous and notorious inmates on death row, the perpetrators of several unmitigated and grisly murders, convicted after more than one well-publicized trial. Both have murdered multiple, innocent victims. Neither is expected to escape execution.

Each inmate has represented himself and fired his lawyers. Each has and has had great difficulty ceding control of his case to his counsel. Each is clever enough to write long, overblown legal papers and condescendingly quizzes his lawyers by throwing out the names of precedent-setting death penalty cases.[23] Although both Sam and Ted know that their new lawyers are inexperienced, they also know that they were very successful law students and come with the backing and resources of a prestigious, large law firm.[24] Both young lawyers conclude that the inmate is in fact not as clever as he thinks he is and that, on the contrary, each inmate has been and remains potentially a danger to his own cause.[25] In both cases the lawyer presses an incompetency claim that the inmate thinks is nonsense.[26]

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[21] *Chamber* 364, 378, 427-28, 440, 464, 476, *Devil* 107, 301

[22] *Chamber* 232-35, 299-300, 452, 463, 464, *Devil* 83, 94-95 97, 141-42, 174, 259, 263, 301, 306-07, 315-16

[23] *Chamber* 80, 118-19, *Devil* 40, 55

[24] *Chamber* 154, 277, *Devil* 27, 55

[25] *Chamber* 118-19, 448, *Devil* 256, 264, 267

[26] *Chamber* 336, 338, *Devil* 81, 128, 176

In the midst of the countdown toward execution, each inmate is stubborn about minor details of prison procedures and is adamant about his exercise privileges.[27] For example, on a rare excursion off death row, each, although facing imminent execution, is angry and obsessed about the comfort/safety conditions in the van in which he is riding.[28]

Each inmate is largely ignored by family and friends.[29] Each goes into a "trance" when the lawyer asks the hard questions about his crimes.[30] Toward the end, each inmate plans to make a complete confession, but warns that it will take a long time because there is so much to confess and it is so deeply buried.[31] Each ultimately admits there were additional victims, previously unknown.[32] Each urges the lawyer to believe he is not the sort of person to hurt anyone.[33] It is difficult, despite twinges of sympathy, not to conclude that both Ted and Sam are profoundly evil men.

Sam and Ted, although of different generations, are described in remarkably similar physical terms, as seen in Table A, attached.

The Judges. Both Adam and Polly are resigned to the fact that the state courts will reject any claims they might bring. Both naively place their faith in the federal dis-

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[27] *Chamber* 118, 136, 152-53, 170-71, 172, 181-82, 220, 41416, 442, 445-46, 454-55, 461, 462, 470, *Devil* 34-35, 92, 138, 144, 155-56, 173, 207, 254-55

[28] *Chamber* 171, *Devil* 177

[29] *Chamber* 69, 104, 321, *Devil* 302, 156

[30] *Chamber* 82, *Devil* 258

[31] *Chamber* 403-04, 406, 448, *Devil* 255-56, 264

[32] *Chamber* 404-06, 467-68, 473, *Devil* 257-59, 270

[33] *Chamber* 130, *Devil* 258.

trict courts, and are severely disappointed.[34] District Court Judge *Sl*attery/*Zl*och is a recent Reagan appointee who is facing his first death case.[35] Judge Slattery/Sharp works all hours to prepare for the case, impatiently calling the lawyers to demand filings in advance.[36] He denies all claims, taking care to avoid grounds for reversal by a *pro forma* review of the record.[37]

The judges/their law clerks informally make known their displeasure with defense claims, even in advance of their filing.[38] The judges revel in press attention[39], and seem to be cozy with the prosecutors in a manner that does not signal success for the inmate's case.[40] The judges set hearings with so little notice that the lawyers must rush across the state to get to a suddenly scheduled hearing.[41] Yet the judges also feel free to protect their leisure activities from interference from this case.[42] In both books, the judges let the lawyers put on extensive testimony about the inmate's mental competency only out of fear of being reversed on appeal.[43]

Allied Counsel. In both books, the protagonist receives a modicum of support by lawyers specializing in defeat-

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[34] *Chamber* 186, 224, *Devil* 85

[35] *Chamber* 224, 226, *Devil* 100

[36] *Chamber* 228, *Devil* 266-67

[37] *Chamber* 419-20, 425, 427, 433-40, 444, *Devil* 133-34, 268

[38] *Chamber* 227, 228, 270-74, 354, *Devil* 100, 133-34, 148

[39] *Chamber* 425, *Devil* 82, 94

[40] *Chamber* 225, *Devil* 267

[41] *Chamber* 299, 423, *Devil,* 130-31, 265, 267

[42] *Chamber* 407, *Devil* 132-33, 270

[43] *Chamber* 434, *Devil* 176

ing imposition of the death penalty. In *The Chamber* that support comes from Hez Kerry, a young black lawyer who has renounced big firm life and who now heads a Southern anti-death-penalty group.[44] Kerry has his genesis in several of Nelson's characters—Mike Mello, a lawyer with an anti-death-penalty group in Florida; Mark Olive, the chief litigator for the same group; and Jeff Robinson, a young black Wilmer associate who has successfully taken on a previous death penalty case, who gets Polly into the case, and who leaves the firm soon thereafter for public service.[45]

Opposing Counsel. Both Adam and Polly face lawyers for the state who are far more experienced and are death zealots. They also seem to appear in droves.[46]

Supporting Characters. The following characters appear in both books:

> The calm, laid-back guard, specializing in handling the condemned, who is solicitous of the inmate and the lawyer.[47]
>
> The corrections officials and personnel who will be disappointed if a stay is granted.[48]
>
> Governors and attorneys general seeking political benefit from the inmate's death, *e.g.*, posturing on TV to show how hard they will work to make sure the inmate is put to death.[49]

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[44] *Chamber* 364

[45] *Devil* 19-21, 77-79, 121

[46] *E.g.*, *Chamber* 203, 225-26, 228, 308-09, 354, 426, 432 *Devil* 133, 172, 200, 235, 269

[47] *Chamber* 74-76, 96, *Devil* 302

[48] *Chamber* 146, 333-34, 437, 466, 469, *Devil* 135

[49] *Chamber* 107-08, 115, 121-22, 140, 202, 313, 359-60, 381 383, 426, 440, 464, 474-75, *Devil* 28, 62, 64-65

A pathetic and insane white inmate who corresponds with Sam/Ted.[50]

The experienced and rough-talking former investigator who alternatively despises and understands the inmate, and who thinks the young lawyer is naive about the extent of his evil.[51]

A young secretary (*Dar*a or *Dar*lene), not the young lawyer's regular secretary, described as working long hours, excited by her role in this notorious case, and very competent.[52]

The evangelical preacher who gains the inmate's respect.[53]

The eccentric psychiatrists testifying for the defense.[54]

Family members who have withdrawn from the inmate. Neither Ted's wife Carole *Boo*ne nor Sam's daughter Lee Cayhall *Boo*th comes to see the inmate before the execution, but both Ted and Sam pretend to understand this.[55] Both inmates have a younger brother who never comes to visit and does his best to withdraw from the inmate and the execution.[56] In both books the inmates have an elderly aunt who calls him her "favorite Nephew" yet does not visit.[57]

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[50] *Chamber* 153, 295, *Devil* 155

[51] *Chamber* 195-96, *Devil* 157-58

[52] *Chamber* 354, 349, *Devil* 93-94, 97-98

[53] *Chamber* 326, *Devil* 139, 304, 300, 319

[54] *Chamber* 348, 426, 433, *Devil* 152, 208, 86, 181, 201

[55] *Chamber* 58, 422, 462, 473, 476-77, *Devil* 271, 302, 306

[56] *Chamber* 321, 389, 454, *Devil* 156

[57] *Chamber* 454, *Devil* 154

Family members of the young lawyer who keep their distance from the case. Both protagonists have mothers who live in a distant state, with whom they talk on the telephone.[58] Each protagonist has a sibling who flies in for a visit during the case.[59]

In sum, each of the important people in Ms. Nelson's book has a counterpart in Mr. Grisham's—from the lawyer and inmate, right on through the judges, other lawyers, relatives, correctional officials, secretaries and politicians.

PLOT

Each book is the story of an unsuccessful attempt by an inexperienced young lawyer to save a notorious condemned murderer from the death penalty. In each, the execution approaches at a steady, relentless pace, despite frantic legal efforts by the protagonist to avoid it. In each, the inmate moves from stoicism, to manic activity, to fear, to a sort of dignified acceptance. In each, the protagonist moves from naive idealism, to awkwardness, to hope, to doubt, to introspection, to overwhelming fatigue and frustration, to disgust at the passion of the public, press and judicial establishment to see the inmate executed, to aggravation at the inmate himself, to a last-minute glimmer of intimacy with the inmate and to numb disorientation following his death. For example, both books share the following sub-plots and themes:

The young lawyer explores his or her personal reasons for taking on this case for this client, and gains a measure of self-knowledge by the end of the book.[60]

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[58] *Chamber*, 328, *Devil* 130

[59] *Chamber* 411-12, 420-24, 429, *Devil* 152-53

[60] *Chamber* 30-34, 43-45, 47-63, 84, 89-91, 95, 103-09, 12324, 132, 166, 195, 206-15, 222-23, 245-61, 264-65, 268-69,

[footnote continued]

Both lawyers are exhausted by and resentful of the extraordinary pace at which the criminal justic system requires counsel to conduct post-conviction death penalty litigation. Each is convinced that the courts to which they are appealing for relief simply want to ensure that the execution goes ahead as scheduled, without any stays.[61]

Both cases receive lurid press coverage, including constant re-caps of old news about the inmate and his crimes. The reporters, both local and national, aggressively seek interviews with the lawyer and with the inmate. The lawyer vacillates at times, but ultimately learns how to handle aggressive press attention.[62]

Both Sam and Ted are depicted as mentally tortured by the uncertainty of the death penalty appeal process.[63]

In both books the inmate has two things he wants to accomplish at the end of his life: (1) publicly to denounce one of the causal factors of his crimes (the Klan/violent pornography), and (2) to confess to all his crimes, even those not charged. Sam springs the Klan letter on Adam while they are awaiting a decision by the Fifth Circuit Court of Appeals, following their

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281, 285-88, 301-05, 371-72, 374-75, 393, 398-401, 409-12, 473, 479, 485, *Devil,* 10, 13-20, 26-27, 44-45, 58-60, 66-70, 73, 83-84, 108-11, 117-18, 138, 140-42, 151, 174, 253, 259, 314-15

[61] *E.g., Chamber* 224-28, 270-71, 308, 312, 335, 353-54, Devil 77, 133, 137-38, 148, 150, 175, 265-68, 100

[62] *Chamber* 102, 147-51, 172-73, 202-03, 241, 325, 340, 35455, 366-67, 372, 376, 407, 440, *Devil* 32-34, 39-40, 65-68, 94, 95-96, 97-98, 112-13, 131, 264, 303, 317-18

[63] *Chamber* 123, 168, 328, 344-45, 408-09, 415-16, 446, 45152, 458, 461, 472, *Devil* 143-44, 173, 207-08, 270, 274, 278, 303

only evidentiary hearing, which dealt with Sam's competency to be executed. Ted springs the confession scheme on Polly while they are awaiting a decision by the Eleventh Circuit Court of Appeals, following their only evidentiary hearing, which dealt with Ted's competency to be tried. In both books, the inmate's plans threaten the pending appeal, and the lawyer attempts to control the inmate in his public statements. In neither case is the lawyer wholly successful.[64]

The following events are among those that advance the plot and these sub-plots in both books:

The protagonist's experiences and feelings:

On first receiving a call from/entering the prison, Polly and Adam both wonder if the operator/guard is having any reaction upon hearing the famous inmate's name.[65]

On the occasion of her/his first contact with the prison, Polly and Adam encounter a prison official who checks up on her/his identity and informs her/him that more lawyer access than usual is permitted in the case of an inmate facing imminent execution. At the same time, the lawyer is told of/notes the conflicting emotions experienced by prison personnel who must deal with inmates on a daily basis and then execute them.[66]

Both young lawyers need to hear the inmate himself describe the crimes to them.[67]

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[64] *Chamber* 377, 447-48, *Devil* 112, 256, 264, 267

[65] *Chamber* 65, *Devil* 25

[66] *Chamber* 67-70, *Devil* 24-25

[67] *Chamber* 129, *Devil* 256, 257

Upon viewing a realistic artistic portrayal (sculpture/movie), the lawyer struggles with her/his sympathy for and strong identification with the victims, and sudden overwhelming hate for the client. The lawyer feels guilt and disgust at her/himself for representing this evil man.[68]

Both are abruptly confronted by partners in the home office while an execution is imminent, warning them that their jobs are in jeopardy because of their single-minded pursuit of the inmate's case. Both are astounded that the partners are not instead offering assistance and support. Neither has any sympathy for the law firm's point of view.[69]

Both are suddenly forced to fly back to the home office of the law firm while the clock is ticking toward execution. Both immediately return the next day.[70]

The lawyer is shown to be as vulnerable as anyone else to the type of violence suffered by the inmate's victims, as the lawyer is/imagines being stalked by a killer. Neither incident affects the relentless forward march of the story line, and neither lawyer is ever confronted by any real personal danger.[71]

The paralyzed young lawyer, still at the office at 8 p.m., gazes out of the office windows into darkness.[72]

Unwelcome words become soothing when spoken with a southern drawl.[73]

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[68] *Chamber* 221-22, *Devil* 68-70, 83-84

[69] *Chamber* 232-39, *Devil* 128-29

[70] *Chamber* 232-41, *Devil* 98-99

[71] *Chamber* 241-44, *Devil* 109-10

[72] *Chamber* 265, *Devil* 18-19

[73] *Chamber* 286, *Devil* 22-23, 28

Both young lawyers avoid reviewing evidence of the inmate's crimes as long as they can.[74]

Both Polly and Adam delight in the luxury of a car paid for by the firm.[75] In each book an experienced, empathetic lawyer walks the young lawyer to and admires that car.[76]

Polly and Adam, in a vacation environment, feel sad that the inmate will never enjoy such experiences.[77]

Goodman/Coleman & Polly stay in a small, quaint lodging house offering a taste of luxury and refinement during their down-and-dirty fight in the last days before the execution.[78]

Both Adam and Polly need to break out of the stifling atmosphere of their offices as the tension mounts waiting for the ruling of the Circuit Court of Appeals. See Table B.

Both Adam and Polly wistfully envy ordinary people unencumbered by the great burden of saving a man from execution. See Table C. They are struck by the carefree demeanor of well-dressed locals on the street and in restaurants going on with their ordinary lives.[79] See Table C.

People get little sleep, people and briefs are rushed to the airport, meals are gulped or postponed, and lawyers check into hotels or board airplanes without clean

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[74] *Chamber* 303, 398-401, *Devil* 44, 66-70, 72-73, 83, 127-28

[75] *Chamber* 307, *Devil* 49

[76] *Chamber* 313, *Devil* 58

[77] *Chamber* 315-16, *Devil* 318

[78] *Chamber* 360, *Devil* 93

[79] *Chamber* 367, *Devil* 98, 269

clothes.[80] But every once in a while the lawyer gets a respite, a quiet meal in a nice restaurant, where there is no talk of the inmate's case.[81]

In the last days before a scheduled execution, Goodman/Polly go shopping for a respite from the pressure, and become giddy with a frivolous purchase/thought of a purchase.[82]

Both Adam and Polly get a sudden break in the demands on them on the Sunday two days before a scheduled execution. They get a full night's sleep and get to flip through newspapers (assiduously avoiding stories about their own case) and drink coffee at leisure, but the peace is subject to disruption at any moment.[83]

Adam and Polly are assaulted and repelled by the excitement of the citizens at the imminence of the execution.[84] They are disgusted as crowds outside the prison jeer and chant.[85]

The young lawyer is shocked by photographs/news footage of people gathered to celebrate a lynching/ the execution, without embarrassment.[86]

Neither young lawyer lets her/himself believe that the execution will in fact take place.[87]

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[80] *Chamber* 235, 306, 355, 367, 380, *Devil* 89, 94-95, 98-99 130, 135, 138, 264, 265, 266, 301

[81] *Chamber* 223, 252, 313, 365-66, 440, *Devil* 94, 98, 177 207, 269-70, 271-72, 301, 323

[82] *Chamber* 385, *Devil* 269

[83] *Chamber* 397-98, *Devil* 98

[84] *Chamber* 370-72, 420-21, 444, *Devil* 272

[85] *Chamber* 457, *Devil* 314, 319

[86] *Chamber* 399-400, *Devil* 318, 328

[87] *Chamber* 480, *Devil* 307, 264, 134

Both lawyers experience the aftermath of the execution as time playing games or not moving forward. The lawyer is/feels hung over. See Table D.

Obstacles in the way of the protagonist's efforts:

The state where the inmate is jailed is competing with other states to be the one with the most executions.[88]

Law firm personnel act coolly toward Adam/Polly to express their displeasure with the firm's representation of this notorious inmate.[89]

While staying at a motel, both lawyers are bombarded by television reports concerning the client's imminent execution, with accompanying political posturing. See Table E.

Jewish/Women partners of the prosperous law firm object to the representation because the inmate killed Jews/women. See Table.

Assorted pundits (most often the press or state attorneys) quote odds on the execution going forward at various points, as if it's all a game.[90]

Governor/Judges exhibit southern courtesy, while denying relief.[91]

Adam/Polly hurriedly backs away at a restaurant from a persistent reporter from *The New York Times/Life* magazine who wants to interview the inmate.[92]

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[88] *Chamber* 83, 99, 444-45, *Devil* 23

[89] *Chamber* 102-03, 147, 232, 240-41, *Devil* 34, 68-69

[90] E.g., *Chamber* 70, 86, 145, 262-63, 274, 314, 356, 362 384, *Devil* 95, 97, 261, 265

[91] *Chamber* 352, *Devil* 82, 94

[92] *Chamber* 366-67, *Devil* 113

Both inmates recognize that the press keeps replaying the "same old rehash/thing," but feel public excitement growing as the execution nears.[93]

In both books, judges disdain psychiatrists who attempt to help inmates avoid the death penalty.[94]

The inmate's experiences and feelings:

The inmate eventually comes to enjoy talking about his crimes, and does so in a chillingly methodical way. After a pause/hemming and hawing, he goes into a "trance," remembers every detail, and seems to admire his own skill. The inmate describes and analyzes the details fondly, without consideration for how cold-blooded it makes him look or how it repulses the young lawyer.[95]

Both inmates feign paranoia about being doped by prison authorities to make the execution go smoothly.[96]

Both inmates stubbornly refuse to make last requests while there is any hope for a stay.[97]

Both inmates are aggressively approached to sell their stories.[98]

The inmate is unnerved upon hearing prison personnel make physical preparations for the execution.[99]

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[93] *Chamber* 407, *Devil* 60, 70

[94] *Chamber* 424, *Devil* 250

[95] *Chamber* 82, 125-35, 361, *Devil* 159-72, 257-59

[96] *Chamber* 302, *Devil* 273

[97] *Chamber* 346, 47, 402, *Devil* 100, 134

[98] *Chamber* 375-7, 394, 408, *Devil* 112

[99] *Chamber* 367-69, 374, 461, 474, *Devil* 100, 278, 296

Both inmates balk at describing one particular murder to a minister.[100]

Each inmate shows his vulnerability and pleads with his lawyer only once. Sam pleads with Adam not to file hopeless last-minute claims, including one asserting that he is incompetent to be executed, because he wants to die with dignity. Ted pleads with Polly to file a hopeless last-minute claim that he is incompetent to be executed, but Polly convinces him to die with dignity instead.[101]

Silence signals meaningful communication between the lawyer and his client near the end. There is nothing appropriate to say. The inmate has retreated to an unknowable, private place.[102]

Both lawyers will tell the inmate anything he wants to hear at the end, when the inmate shows genuine emotion about his personal relationships.[103]

Case events:

Both inmates had been identified by a witness who came forward only after the defendant had been indicted and his face had been prominently featured in the press.[104]

The young lawyer is excited when she/he realizes that a witness who was never called to testify at trial may have evidence that will exonerate the inmate, or otherwise diminish his culpability. In each case, the missing

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[100] *Chamber* 405, *Devil* 319

[101] *Chamber* 366-39, 408-10, Devil 274-75

[102] *Chamber* 411, 454, *Devil* 288, 305-06

[103] *Chamber* 476-77, *Devil* 303

[104] *Chamber* 126, *Devil* 46-47

witness had supposedly spotted the inmate/the victim *at a truck stop.* In each case the protagonist wants badly to believe in the worth of this testimony, but is firmly disabused of his hope by the inmate.[105]

Unlike the competency claim, the inmate is enthusiastic about the first major ground for reversal put forth by the lawyer, and eagerly offers to help with legal research.[106]

Adam/Polly seeks out a former investigator on the case, hoping he will provide helpful information. That investigator takes control of the interview and provides cryptic information both reinforcing and mitigating the inmate's culpability.[107]

Law students have a ball working on both cases.[108]

During the competency hearing, the judge interrupts the testimony once to ask his own question, apparently out of sheer curiosity.[109]

Both Ted and Sam are curious when they see on television a young black lawyer they have never met, who is part of the defense team, explaining what the defense team is up to.[110]

At one point, the state's lawyers and the inmate's lawyers appear to share the sense that they are being caught up in ridiculous time limits, and the state's lawyers graciously offer their facilities to counsel for

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[105] *Chamber* 130-31, 206, *Devil* 127-28

[106] *Chamber* 174-81, *Devil* 61

[107] *Chamber* 187-201, 290-93, *Devil* 157-58

[108] *Chamber* 427, *Devil* 84, 93

[109] *Chamber* 439, *Devil* 195

[110] *Chamber* 445, 447 *Devil* 158

the inmate. A fancy phone system is required for the expedited decision from the Circuit Court of Appeals, which all the lawyers recognize is simply going through the motions. The inmate's appeal is denied virtually instantly the same afternoon.[111]

On the night before the execution, Adam and Polly are both called out of their last "huddled" meeting with the inmate to take a telephone call from the supervising partner, who is monitoring the last possibility for saving the inmate's life.[112]

Parallel gratuitous details:

Both law firms have Christmas parties, mentioned in passing.[113]

Lee and Polly focus on the physical details of the victims' deaths and, at least momentarily, declare legal niceties superfluous.[114]

Many other death row residents have been waiting for their executions longer than have Sam or Ted[115], and the warden/allied counsel is already thinking ahead with dread to the next execution after Sam/Ted.[116]

The lawyer's family members get to follow the course of events in the press due to extensive, nationwide publicity, but do not actively offer support.[117]

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[111] *Chamber* 451, *Devil* 268-69

[112] *Chamber* 462, *Devil* 303-04

[113] *Chamber* 24, *Devil* 17

[114] *Chamber* 60, *Devil* 73

[115] *Chamber* 82, *Devil* 64

[116] *Chamber* 87, *Devil* 28

[117] *Chamber* 108, 328, *Devil* 101-03, 131

Professional death penalty lawyers bolster their confidence by telling war stories with their fellows.[118]

DESCRIPTIONS

Many descriptive passages in the two books are so strikingly similar that copying by Mr. Grisham is the only rational explanation.

One example is when the young lawyer drives toward the prison and meets the condemned inmate for the first time. Both Adam and Polly feel not "particularly . . . welcome"/"unwelcome" and drive cautiously past "ramshackle" buildings, numbed by their cars' sound systems. See Table G. The lawyer suddenly feels reluctant to proceed toward the prison after reading a sign indicating that the prison is five/six miles ahead.[119] Each lawyer's shoes become a focal point as she/he awaits clearance through prison security procedures.[120] The young lawyer is surprised at the large size of the room in which he/she first meets the inmate.[121] In both cases the lawyer is nervous, but reminds him/herself that he/she is up to the job at hand given the "formidable" resources of the large law firm.[122] Each lawyer has great difficulty looking her/his new client in the eye, and each is surprised at how short, thin and pale the prisoner is. See Table H.

The following are some additional examples:

The young lawyer and the supervising partner sit together in silence in a rare shared moment after receiving bad news and realizing the struggle ahead.[123]

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[118] *Chamber* 441, *Devil* 108-09

[119] *Chamber* 64, *Devil* 51

[120] *Chamber* 74, *Devil* 53

[121] *Chamber* 74-75, *Devil* 53-54

[122] *Chamber* 75-76, *Devil* 55, 27, 25

[123] *Chamber* 41, *Devil* 263

Both inmates are described as stubbornly keeping secret the truth about their crimes because of an oath or vow made to others as well as to themselves.[124]

The prison entrance is announced by an arched sign. See Table I.

Both young lawyers are blinded by the brilliant mid-day sun outside the prison.[125]

In both books, barbed wire is described as "razor wire," and particularly as "gleaming" razor wire.[126]

The protagonist looks out another lawyer's window to see the rooftops of nearby buildings.[127]

Lee and Polly sink low into sofas.[128]

"Bulky" legal files are maintained by the inmate.[129]

The physical description of Todd *Mark*s copies that of *Mark* Olive. See Table J.

Conversation between the lawyer and the investigator/psychiatrist with insight into the inmate's criminal nature is made impossible by the roar of a motor.[130]

A breeze chases away humidity.[131]

Both Adam and Polly "stare" at a "blank computer screen."[132]

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[124] *Chamber* 44, *Devil* 172, 259, 280

[125] *Chamber* 96, *Devil* 52

[126] *Chamber* 73, 98, *Devil* 52

[127] *Chamber* 100, *Devil* 9

[128] *Chamber* 106, *Devil* 30

[129] *Chamber* 113, *Devil* 55

[130] *Chamber* 190, *Devil* 316

[131] *Chamber* 238, *Devil* 157

[132] *Chamber* 103, 265, *Devil* 174

The primary defense psychiatrist is described as completely incapable of/bypassing small talk.[133]

Expert psychiatrists gain credibility from talking differently/having an accent, traveling great distances, and illuminating the courtroom by the color of their clothes. See Table K.

WORD USAGE

Mr. Grisham must have seen and studied Ms. Nelson's manuscript of the *Devil* before completing *The Chamber.* There is no other rational explanation for the striking similarities in plot, character, and description that we have set out above. As additional evidence, however, we have discovered Polly Nelson's literary "fingerprints" throughout *The Chamber* in Mr. Grisham's use of her distinctive words and phrases.

First, many distinctive word combinations or phrases appear in both *The Chamber* and *Defending the Devil,* but cannot be found anywhere in the four novels published previously by Mr. Grisham. We've listed a few of them in Table L. We continue to find more examples.

In addition, certain individual words used in the *Devil* also appear in *The Chamber* but apparently not in any other Grisham novel. There appear to be scores if not hundreds of examples of this phenomenon. Some are very telling, common words, the repetitive use of which constitutes an integral stylistic habit that signals a particular authorship. For example, the word "typically" appears seven times in the *Devil* and nine times in *The Chamber.* The word has never been used by Mr. Grisham in any of his other published novels.

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[133] *Chamber* 348, *Devil* 115

Other words are so uncommon as to preclude the likelihood that their appearance for the first time in this, Mr. Grisham's fifth novel is coincidental. Among these are "pesky," "chirpy," "scruffy," "ruckus," "slinky," "interminable," "inundate," "quipped," "steely," "reverberate," "glint," "forsaken," "pristine," and "wistfully." All of these (and many others) appear in both the *Devil* and *The Chamber*, and apparently not in any prior Grisham novel.

IMMATERIALITY OF DISTINCTIVE ELEMENTS

We are mindful, of course, that *The Chamber* employs certain story lines not present in *Defending the Devil*. None of these distinctive elements, however, is an integral part of Mr. Grisham's book, and most, on closer analysis, turn out not to be "distinctive" at all.

For example, Rollie Wedge stalks Lee and Adam, and comes to threaten Sam. Yet nothing becomes of this subplot–Wedge simply vanishes, and the protagonist Adam never even knows that he may have been in danger. Wedge's return and his menacing actions thus have no effect whatsoever on Mr. Grisham's story. It turns out that the explanation for this narrative lapse is a simple one–Mr. Grisham is copying an incident where Polly Nelson *imagines* that she is being stalked at the death penalty conference.[134] Since Polly's stalker is an imaginary one (and, thus, can have no impact on the events of her nonfiction account), Mr. Grisham's copycat stalker plot line likewise can have no impact on his novel. So too with other diversionary parts of Mr. Grisham's story such as Lee Booth's relentless social work, her alcoholic relapse, and her retreat into a recovery program. These events in no way advance Mr. Grisham's story, and in

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[134] *Devil* 109-110

fact distract from it and lead nowhere. They are, of course, simply a thinly disguised version of the real life story of Polly Nelson.

Finally, the fact that Adam is Sam's grandson—what might be urged as the most striking difference between the two books—is in fact another, central parallel. Just as Adam is called to understand and defend his grandfather (and thus understand his family, his upbringing and himself), Polly too is irresistibly driven by her unhappy family relationships to undertake the career-destroying and hopeless task of defending a "worm" such as Ted Bundy. Adam's defense of his grandfather Sam is surely derived from the central theme of Polly's book: "I was born to represent Ted Bundy."

THE CHAMBER IS WHOLLY UNLIKE ANY PREVIOUSLY PUBLISHED GRISHAM NOVEL

That Mr. Grisham copied Ms. Nelson's book is further established by a comparison of *The Chamber* with the other published works of Mr. Grisham. As the reviewers have recognized, and as we are prepared to demonstrate by expert testimony, *The Chamber* is a very different book than any previously associated with Mr. Grisham.

ACCESS

After receiving an 80-page version of the *Devil* (then named *peace, ted*), Doubleday editors met with Ms. Nelson and her agent at Doubleday's offices on October 15, 1990, to discuss her book proposal in expansive detail. Of course Ms. Nelson submitted her proposal and participated in such a meeting only on the premise that Doubleday would not publish her story without compensation and credit to her.

RESOLUTION

We have written this letter only after careful analysis of the facts and the available legal remedies. We will, of course, carefully consider any evidence that you may wish to submit that points to conclusions other than those set out above.

This letter's purpose is to avoid litigation, if that is possible. We have addressed it to Doubleday and Mr. Grisham, but we urge you to share it with other potentially affected parties such as the purchasers of the movie rights, foreign rights, etc. We are informed by press accounts that *The Chamber* was sold to Universal Studios in the summer of 1993 for a substantial sum. We are unaware of the current status of any motion picture based on Mr. Grisham's book, but feel constrained to state that release of a motion picture based on *The Chamber* without concomitant compensation and credit to Ms. Nelson is unacceptable.

This letter notifies you of our claim and demands that you desist from all infringing activities. Please be advised that we require you to retain any and all potentially relevant evidence. We will take the position that the loss or destruction of any potentially relevant evidence after receipt of this notice is evidence of liability, evidence of bad faith, and an act designed to obstruct justice.

I look forward to discussing with you, or your representatives, the terms under which we might compromise this claim. We will be required to seek judicial redress if we do not hear from you within the next two weeks.

Sincerely,

/s/ Patricia D. Douglass
Patricia D. Douglass

cc: Polly Nelson

Table A

The Chamber
p.43: [Description of Sam in prison:] "'Thin—but then you seldom see a fat one on the Row—nerves and lean food. . . His hair is gray and oily, as I recall. . . They're confined for twenty-four hours a day, so they sort of bleach out. Real pale, fair, almost sickly-looking. Sam has blue eyes, nice features. I suspect that at one time Sam Cayhall was a handsome fellow.'"
p.77: "His face was pallid, the only color coming from the salt and pepper stubble of five days' growth. His hair was long, gray, and oily, and slicked back severely. Adam decided quickly that he looked nothing like the frozen images from the video. Nor did he resemble the last known photos of himself, those from the 1981 trial. He was quite an old man now, with pasty delicate skin and layers of tiny wrinkles around his eyes. Deep burrows of age and misery cut through his forehead.
p.77: "[Sam's] only attractive feature was the set of piercing, indigo eyes that lifted themselves from the card."
p.126: "Adam watched [Sam's] face carefully. The fierce blue eyes were steady."
p.408: "Adam searched [Sam's] brilliant blue eyes."

Table A

Defending the Devil
p.54: [Description of Ted in prison:] "He was incredibly lean, taut as catgut. I could see in his facial structure how once he had been handsome, but now he looked drawn and worn. His hair was short and coarse, a dull grey. His skin was lifeless, ashen. Ted looked like a walking cadaver--except for his eyes. Just barely blue and clear as glass, Ted's eyes looked newborn, fully alive, fully communicative. In fact, whenever I talked to him I felt like I was having two conversations at once, one with our words, and one with our eyes. It was as if Ted's eyes were peepholes someone else was peering out of. Someone deep inside, predating his horrible history and the worn-out exterior that reflected it."

Table B

The Chamber
p.365: "The Fifth Circuit was sitting on his ineffectiveness of counsel claim. Nothing was moving on Thursday. The courts were just sitting there as if these were ordinary lawsuits to be filed and assigned and docketed, then continued and delayed for years. He needed action, . . He paced round the table in his office and listened for the phone. He was tired of pacing and sick of the phone. . . Adam suddenly hated the place. He needed fresh air. He told Darlene he was going for a walk, and left the building."

Table B

Defending the Devil
p.134: "Dark fell as we sat in CCR's cluttered offices waiting for an answer from the Eleventh Circuit. In the Chi Omega case, we'd had a stay by four in the afternoon. This time, at eight the court's death clerk admitted they were having a problem getting the papers to the three judges on our panel, the same panel as in the Chi Omega case. . . I became very discouraged. At 11:00 pm there was still no word. I couldn't stand to spend another minute in CCR's office. I felt confined, suffocated; I wanted to run away, or scream. I left to stand out in the street, to get out of that pressure cooker, but Scharlette Holdman sent Mike Mello to bring me back because the streets were not safe."

Table C

The Chamber
p.367: "Adam left the Peabody, and strolled to Front Street near the river, passing along the way scores of well-dressed young people very much like himself, all in a hurry to go home. He envied them their vocations or careers, whatever their pressures at the moment, they weren't carrying burdens as heavy as his."

Table C

Defending the Devil
p.43-44: "As a group they'd be asked what their job was, their leisure activities, what newspapers and magazines they read. One picture would emerge of a juror whose answer on the first round was 'hairstylist;' on the second round, 'going to the beach;' and on the third round, 'Mademoiselle, Glamour.' Another picture entirely would be evoked by the answers 'truck driver,' 'hunting sometimes, fishing,' and 'Rod and Gun.' Each was unique, distinctive, defining an irreproducible human being. Each life seemed to be driven by its own inevitable internal logic. I envied them their ordinary lives, unencumbered by the responsibility for saving a man from the electric chair."

Table D

The Chamber
p.482: "There were two unopened beers sitting in the grass. Three empty cans had been tossed against a nearby headstone. The first empty can was still in the car. The dawn was breaking. Shadows fell toward [Adam] from the rows of other gravestones. The sun itself was soon peeking at him from behind the trees. He'd been there for a couple of hours, though he'd lost track of time. Jackson and Judge Slattery and Monday's hearing were years ago. Sam had died minutes ago. Or was he dead? Had they already done their dirty act? Time was still playing games. [H]e'd drunk the warm beer and thown the cans at the largest monument within range."

Table D

Defending the Devil
p.311: "My eyes opened at the exact moment of the execution, at 7:06 in the morning of Tuesday, January 24, 1989. I pulled them shut. I was going to sleep through. They snapped back open. They stared at the clock. The hands on the clock never seemed to move. Time would not move forward. My body was immobile, too. I felt drugged, paralyzed, as if I had a terrible, terrible hangover. It was not over. I was still a prisoner. . . I was completely in the grasp of the buzzing prison radar, so strong that morning that it reached past Starke, all the way to Gainesville, all the way to my bed in the hotel where I was registered under a false name. It held me in suspension. Eons later, after the ice age, after the stone age, it was ten o'clock." p.318: "I was trying to pull time along, away from the execution. I was trying to break the roaring silence in the apartment, to color the grey that surrounded me."

Table E

The Chamber
p.222: "He found a Holiday Inn and paid for a room. He called Lee and reported in, then watched the evening news on the Jackson channels. Evidently, it had been just another languid summer day in Mississippi with little happening. Sam Cayhall and his latest efforts to stay alive were the hot topics. Each station carried somber comments by the governor and the Attorney General about the newest petition for relief filed by the defense this morning and each man was just sick and tired of the endless appeals. Each would fight valiantly to pursue this matter until justice was realized."

Table E

Defending the Devil
p.126: "That night I stayed at a motel outside of Lake City, that was on the way toward the prison, where I was going to see Ted the next day. . . And then I turned on the TV and, on every channel, I heard 'Ted Bundy,' 'Ted Bundy,' 'Ted Bundy.' It was not my imagination. It was election time in Florida and every candidate was running against Ted Bundy. According to news accounts, Ted Bundy's name was mentioned in the campaign commercials more often than the candidates'. There was a candidates' debate that night, and the very first issue mentioned by every single one of them was how much faster he would kill Ted Bundy than his opponents would."

Table F

The Chamber
p.237: [One partner accusing another:]"'Do you secretly want to see Sam Cayhall executed because he killed Jews?'"

Table G

The Chamber
p.63: [As Adam drove toward the prison for the first time:] "He didn't particularly feel welcome, and though he wasn't particularly afraid of anything he drove a cautious fifty-five and refused to pass anyone. The road narrowed and sunk onto the flat plain of the Mississippi Delta, and for a mile Adam watched as a levee snaked its way to the right and finally disappeared. . . It was in these towns and farms, these ramshackle shotgun houses and dusty country stores and colorful juke joints along Highway 61 where the blues were born and spread northward. . . He listened to an old Muddy Waters cassette as he entered the infamous county of Tunica, said to be the poorest in the nation."

Table F

Defending the Devil
p.143: "[T]he women partners were questioning their partnership shares going to represent a man who had specifically targeted women for murder. Wasn't this like Jews contributing to the representation of Adolf Hitler, they wondered?"

Table G

Defending the Devil
p.50-51: [As I drove to toward the prison for the first time:] "Once on the highway, I set the cruise control, electronically glided the deep driver's seat way down and way back, and turned the stereo on loud. A lowrider in a big car, I floated through the bleak, scruffy countryside of middle Florida like an alien in a space bubble. I felt estranged from the world outside, conspicuous in my big white car. Stands of tall trees flanked the road, occasionally revealing a ramshackle beer tavern or hot-peanut stand. I thought of how unwelcome I'd be if the people who lived among those trees knew my destination, my mission."

Table H

The Chamber
p.76: "A door bolt clicked, and he jumped through his skin. It opened slowly, and a young white guard stepped into the inmates' side. Behind him, in a bright red jumpsuit, hands cuffed behind, was Sam Cayhall. He glowered around the room, squinting through the screen, until his eyes focused on Adam. A guard pulled at his elbow and led him to a spot directly across from the lawyer. He was thin, pale, and six inches shorter than both guards, but they seemed to give him plenty of room. . . Though he tried valiantly, Adam was unable to look Sam in the eyes for more than two seconds. He busied himself with important note taking on the legal pad, and as he numbered each line he could feel the heat of Sam's stare."

Table H

Defending the Devil
pp.54-55: "Suddenly, the only door to the visitor's room burst open and Ted was led in by a guard. He was bent over, his hands were cuffed behind his back, and he was balancing a bulging file folder behind him. The stone-faced guard took the folder from Ted, inspected it, uncuffed his hands from behind, and recuffed them in front. Holding his folder with his joined hands, Ted slowly unfolded his body. On the unspoken pretext of the guard's presence, none of us spoke as Ted straightened out. I didn't know where to look. I didn't want to embarrass Ted by viewing this dehumanizing spectacle, yet I didn't want to shun him either. So I looked back and forth between him and Vic. Vic's eyes were an oasis of comfort. Whenever I looked at Ted, on the other hand, he'd quickly look away. We made eye contact only at the corners of our eyes. Ted looked smaller than I'd expected. Even after he straightened up, he stayed stooped short of his full five feet eleven inches. He was incredibly lean . . . His skin was lifeless, ashen." p.53: "I could barely look in [Ted's] direction. We did no more than acknowledge each other with a brief, magnetic stare."

Table I

The Chamber
p.64: " Instead, Adam saw an entrance to the right and the words MISSISSIPPI STATE PENITENTIARY spanning from an arch above it."

Table J

The Chamber
p.149: "Todd Marks was no more than twenty-five. He wore wire-rimmed glasses and hair to his shoulders."

Table I

Defending the Devil
p.51: "Abruptly, the dark tunnel of trees ended at two man-size stone booths with long, narrow, vertical peepholes, linked together by a wrought iron sign that arched over the road: FLORIDA STATE PRISON."

Table J

Defending the Devil
p.29: "Now add, in person, the wise teacher [Mark Olive] with a voice like simmering molasses, brown hair that fell to his shoulders, wire-rim eyeglasses, and beat-up blue jeans."

Table K

The Chamber
p.348: "The psychiatrist was Dr. Swinn, a cold, unsmiling man in a black suit. He had wild, bushy hair, dark eyes hidden behind thick glasses, and was completely incapable of small talk."
p.433: "[Dr.] Swinn's answers were accented with the crispness of the upper Midwest, and this was fine. Experts should talk differently and travel great distances in order to be highly regarded."
p.433: "With his black hair, black beard, black glasses, and black suit, [Dr. Swinn] indeed gave the appearance of an ominously brilliant master of his field."
p.435: "Swinn fielded each question [on crossexamination] with a fluid answer that only added to his testimony on direct examination."

Table K

Defending the Devil
p.115: "'*Did you know that your client is bipolar?!*' Dr. Lewis is not one to mince words. Even thought this was the first time we'd spoken, she bypassed the small talk . . ."
p.201: "[Dr. Tanay] showed—at this, my first deposition—why he truly deserved the title 'expert witness.' Still thickly-accented after some 30 years in this country, Polish-born Dr. Tanay projected perfect Germanic confidence in his psychiatric findings, which just happened to fit our legal arguments perfectly."
p.208: "[O]nce on the stand, Dr. Dorothy Lewis was brilliant—clear, convincing, articulate. Resplendent in a deep purple suit, she illuminated the courtroom."
p.201: "As a bonus, Dr. Tanay manifested equally perfect disdain for the efforts of the state's attorney [on crossexamination] to throw my questioning off track or to undermine [on crossexamination] any word of his testimony, going into speeches on the record about how Mr. Menser interrupting him, and he had never been treated so rudely, etc."

Table L

The Chamber
p.27: "[Adam, asking Goodman to give him the assignment:] 'It's, uh, well, it's a death penalty case.'"
p.38: "[Wycoff, defending Adam in partners' meeting:] 'Look, Daniel, we're talking about a man on death row. He needs a lawyer, dammit!'"
p.63: "It was in these towns and farms, these ramshackle shotgun houses and dusty country stores and colorful juke joints along Highway 61 where the blues were born and spread northward."
p.80-81: "'Does it ever strike you as odd how the the same court can change its mind whenever it wants to? Think about it. For two centuries the U.S. Supreme Court allowed legal executions. Said they were consitutional, covered nicely by the Eighth Amendment. Then, in 1972 the U.S. Supreme Court read the same, unchanged Constitution and outlawed the death penalty. Then, in 1976 the U.S. Supreme Court said executions were in fact constitutional after all. . . Now the U.S. Supreme Court is changing the rules again with the same Constitution."
p.87: "[Warden Naifeh:] 'The Pizza Man? Forgive me.' [Mann:] 'Malcolm Friar. Killed three pizza delivery boys in a week. . . ' Naifeh raised both hands and nodded. 'Okay, okay, I remember. . .'"

Table L

Defending the Devil
p.20: "[Jeff Robinson, asking Polly to take the assignment:] 'It's a death penalty case . . .'"
p.23: "But it seemed clear to me. A man on death row needed a lawyer; time was running out."
p.50: "Stands of tall trees flanked the road, occasionally revealing a ramshackle beer tavern or hot-peanut stand."
p.75: "[The Florida Supreme Court justices] were not going to overturn Ted Bundy's conviction no matter what . . . They finally issued an opinion that it had been okay in his case, but that thereafter, in any *other* case, such hypnotically altered testimony was not constitutionally admissable as evidence. Not that the Constitution had changed in the meantime."
p.208: "[Dr. Lewis:] 'Who's that?! I don't know who that is!' [Polly:] 'Mike Minerva's investigator, you know, you talked to him on the phone last night.' 'Yes, yes, yes, okay, okay, I remember.'"

Table L, Continued

The Chamber
p.100: "[Cooley to Adam re: Memphis office:] 'It's yours for the, uh, duration.'"
p.106: "It had never occurred to Lee that she would one day be asked to recall in detail so much of this sad little history. She had worked so hard to forget it."
p.107: "[Lee:] 'I remember reading it with horror.'"
p.107: "[Lee:] 'After all these years, the name Sam Cayhall was once again in the paper. I couldn't believe it.'"
p.154: "[Sam:] 'It'll be nice to have somebody who can run to court and argue with judges, somebody who can fight with the state on equal footing.'"

Table L, Continued

Defending the Devil
p.64: "I had irrevocably signed on for the duration as 'Bundy's Lawyer.'" p.87: "I headed down to Florida for the duration of the death warrant . . ." p.124: "[Vic had] had to give up most of the rest of his practice for the duration of the trial."
p.66: "[Ted:] 'I'm not going to watch it. I've worked too hard to put all that behind me. I'm another person now.'"
p.168: "I read them in horror . . ."
p.65: "I couldn't believe this was happening. Some 6 years after the publicity of the trial, the passion would be reignited."
p.27: "[Ted] just seemed relieved that he had someone to represent him, particularly someone with the backing of a law firm like Wilmer . . ."

Table L, Continued

The Chamber
p.161: "[Lee:] '[I]t all starts with the idea that I can have a drink or two and keep it under control. I went one month one time sipping wine and limiting myself to a glass a day. Then it was a glass and a half, then two, then three. Then rehab. I'm an alcoholic, and I'll never get over it.'"
p.195: "'What about the victims?'"
p.224: "It was sent to the Honorable F. Flynn Slattery, a young federal judge who was new to the bench."
p.261: "[W]hen he awoke for the last time the sunlight filtered through the blinds and cast neat lines across his bed."
p.264: "[Adam and Lee] looked at graves and relived a nightmare . . ."

Table L, Continued

Defending the Devil
p.17: "In early February 1986 I quit drinking with the firmest resolve ever, with the intention of drying out for six months and regaining some control." p.141-42: "Through the spring of my new sobriety I'd still had in mind that I'd start again, with a clean body. Get my tolerance down, be satisfied with one or two drinks. But when we went to Miami . . . I knew I could never drink again. . . I knew that I would drink until I was drunk. I wanted to drink to an alcoholic epiphany . . . I knew then I would never 'dry out' and become a normal drinker. I knew then I could never drink again." p.314: "[Polly:] 'I'm an alcoholic,' I said. [Dr. Lewis:] 'How do you know?' 'Because when I drank I couldn't stop. I'd drink ten, twelve drinks and it still wouldn't be enough.'"
p.33, 98, 264: "'What about the victims?'"
p.100: "[Federal district court Judge Zloch] was a very gentlemanly young judge, new to the bench, a Reagan appointee."
p.21: "When I woke up the next morning, with the sun shining through the shutters . . ."
p.273: "[Ted:] 'Well, it's reliving it, reliving is a nightmare.'"

APPENDIX D

DOCKET ENTRIES

TYPE E APPEAL
JURY

U.S. District Court
USDC District of Columbia (Washington)
CIVIL DOCKET FOR CASE #: 95-CV-149

Filed: 01/20/95
Jury demand: Plaintiff
Nature of Suit: 820
Jurisdiction:
Federal Question

NELSON v. GRISHAM, et al.
Assigned to:
Judge Royce C. Lamberth
Demand: $10,000,000
Lead Docket: None
Dkt# in other court: None

Cause: 17:501 Copyright Infringement
Case type: 1. civil 2. null

POLLY NELSON
plaintiff

Patricia Dwyer Douglass
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v.

JOHN GRISHAM
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1/20/95	1	COMPLAINT filed by plaintiff POLLY NELSON; jury demand; exhibits (3) (st) [Entry date 01/25/95]
1/20/95	–	SUMMONS (2) issued for defendant JOHN GRISHAM, defendant BANTAM, DOUBLEDAY (st) [Entry date 01/25/95]
1/26/95	–	MAILED CJRA brochure, Meet and Confer list, and Notice regarding dismissal to plaintiff POLLY NELSON (mlp)
2/9/95	2	WAIVER OF SERVICE returned executed by defendant JOHN GRISHAM. Date waiver sent: 1/21/95 (mlp) [Entry date 02/10/95]
2/9/95	3	WAIVER OF SERVICE returned executed by defendant BANTAM, DOUBLEDAY. Date waiver sent: 1/26/95 (mlp) [Entry date 02/10/95]
2/17/95	4	STIPULATED ORDER by Judge Royce C. Lamberth: extending the time until 3/17/95 for defendants to file their answer. (N) (fle)
3/17/95	5	MOTION filed by defendant JOHN GRISHAM, defendant BANTAM, DOUBLEDAY to dismiss complaint [1-1], or in the alternative, for summary judgment; exhibits (19) (mlp) [Entry date 03/21/95]
3/17/95	6	RULE 109 Certificate of disclosure of corporate affiliations and financial interests by defendant JOHN GRISHAM,

defendant BANTAM, DOUBLEDAY (mlp) [Entry date 03/21/95]

3/17/95 – CALENDARED (mlp) [Entry date 03/21/95]

3/29/95 7 STIPULATED ORDER by Judge Royce C. Lamberth : extending the time until 4/28/95 for plaintiff to respond to Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment; extending the time until 4/26/95 for defendants to reply. (N) (fle) [Entry date 03/30/95]

4/20/95 8 MOTION filed by plaintiff POLLY NELSON to file excess pages limitation for memorandum in opposition to motion to dismiss or, in the alternative, for summary judgment (mlp) [Entry date 04/21/95]

4/24/95 9 ORDER by Judge Royce C. Lamberth : granting motion to file excess pages limitation for memorandum in opposition to motion to dismiss or, in the alternative, for summary judgment [8-1] by POLLY NELSON (N) (fle) [Entry date 04/25/95]

4/28/95 10 RESPONSE by plaintiff POLLY NELSON in opposition to motion to dismiss complaint [1-1] [5-1] by BANTAM, DOUBLEDAY, JOHN GRISHAM, motion for summary judgment [5-2] by BANTAM, DOUBLEDAY, JOHN GRISHAM; declarations (4); appendices (2) (mlp) [Entry date 05/03/95]

5/15/95 11 STIPULATION and ORDER filed and fiated by Judge Royce C. Lamberth : extending the time until 6/15/95 for defend-

ants John Grisham and Bantam, Doubleday, Dell Publishing Group, Inc. to serve and file their reply to Plaintiff's Opposition to Defendants' Motion to Dismiss Or for Summary Judgment. . (N) (fle) [Entry date 05/16/95]

6/15/95 12 MOTION filed by defendant JOHN GRISHAM, defendant BANTAM, DOUBLEDAY to strike the declaration of Jack Jorgens and the 2/27/95 article from The New York Observer attached to the declaration of Patricia D. Douglass (mlp) [Entry date 06/16/95]

6/15/95 13 REPLY MEMORANDUM by defendant JOHN GRISHAM, defendant BANTAM, DOUBLEDAY in support of motion to dismiss complaint [1-1] [5-1] by BANTAM, DOUBLEDAY, JOHN GRISHAM, motion for summary judgment [5-2] by BANTAM, DOUBLEDAY, JOHN GRISHAM; exhibits (4) (mlp) [Entry date 06/16/95]

6/29/95 14 RESPONSE by plaintiff POLLY NELSON in opposition to motion to strike the declaration of Jack Jorgens and the 2/27/95 article from The New York Observer attached to the declaration of Patricia D. Douglass [12-1] by BANTAM, DOUBLEDAY, JOHN GRISHAM . (mlp) [Entry date 06/30/95]

6/30/95 15 NOTICE OF FILING by plaintiff POLLY NELSON of supplemental declaration of plaintiff; attachment (mlp) [Entry date 07/03/95]

7/12/95 16 REPLY by defendant JOHN GRISHAM, defendant BANTAM, DOUBLEDAY to response to motion to strike the declaration of Jack Jorgens and the 2/27/95 article from The New York Observer attached to the declaration of Patricia D. Douglass [12-1] by BANTAM, DOUBLEDAY, JOHN GRISHAM (mlp) [Entry date 07/17/95]

8/1/96 – SCHEDULING NOTICE: motion hearing set for 4:00 9/4/96 ; before Judge Royce C. Lamberth . (1pp)

9/4/96 – MOTION HEARING before Judge Royce C. Lamberth taken under advisement by BANTAM, DOUBLEDAY, JOHN GRISHAM motion to dismiss complaint [1-1] [5-1], taken under advisement by BANTAM, DOUBLEDAY, JOHN GRISHAM motion for summary judgment [5-2] Reporter: Theresa Sorensen (mon)

9/26/96 17 MEMORANDUM OPINION by Judge Royce C. Lamberth (N) (fle)

9/26/96 18 ORDER by Judge Royce C. Lamberth : granting motion for summary judgment [5-2] by BANTAM, DOUBLEDAY, JOHN GRISHAM, dismissing case. (N) (fle)

10/10/96 19 MOTION filed by defendant JOHN GRISHAM, defendant BANTAM, DOUBLEDAY for attorney fee (st) [Entry date 10/15/96]

10/24/96 20 RESPONSE by plaintiff POLLY NELSON in opposition to motion for attorney fee [19-1] by BANTAM, DOUBLEDAY,

JOHN GRISHAM . (st) [Entry date 10/28/96]

10/24/96 21 NOTICE OF APPEAL by plaintiff POLLY NELSON from orderI [18-1], entered on: 9/26/96. (fees not paid); Copies mailed to defendants, (Submitted to Lamberth, J.) (st) [Entry date 10/28/96]

10/28/96 – TRANSMITTED PRELIMINARY RECORD on appeal [21-1] by POLLY NELSON to U.S. Court of Appeals (st)

11/5/96 22 REPLY by defendants to response to motion for costs and attorney's fees [19-1] by BANTAM, DOUBLEDAY, JOHN GRISHAM (ks) [Entry date 11/06/96]

11/12/96 – USCA #96-7235 assigned for appeal [21-1] by POLLY NELSON (mlp) [Entry date 11/13/96]

12/31/96 – USDC appeal fee of $5.00 and USCA docketing fee of $100.00 received, for appeal [21-1] by POLLY NELSON , by plaintiff POLLY NELSON. USCA notified. (st)

12/31/96 – TRANSMITTED PRELIMINARY RECORD (SECOND) on appeal [21-1] by POLLY NELSON to U.S. Court of Appeals (st)

1/15/97 – USCA # 96-7235 assigned for appeal [21-1] by POLLY NELSON (jmf)

(21)

Supreme Court, U.S.
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No. 97-1073

IN THE

Supreme Court of the United States

October Term, 1997

POLLY NELSON,

Petitioner,

v.

JOHN GRISHAM

and

BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION

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17pp

QUESTION PRESENTED

Whether this Court should review the dismissal of a copyright infringement action where the courts below reviewed the works at issue and found no substantial similarity in their protectible expression.

PARTIES TO THE PROCEEDINGS

Respondent John Grisham ("Mr. Grisham") is an individual. Respondent Bantam Doubleday Dell Publishing Group, Inc. ("Doubleday"), a book publisher, is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in the State of New York.

RULE 29.6 LISTING

Respondent Doubleday is wholly owned by Bertelsmann, Inc., a corporation organized and existing under the laws of the State of Delaware. Doubleday has no nonwholly owned subsidiaries.

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No. 97-1073

IN THE

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October Term, 1997

POLLY NELSON,

Petitioner,

v.

JOHN GRISHAM

and

BANTAM DOUBLEDAY DELL PUBLISHING GROUP, INC.,

Respondents.

BRIEF IN OPPOSITION

Respondents John Grisham and Bantam Doubleday Dell Publishing Group, Inc. respectfully pray that the Court deny the instant Petition. After an "exhaustive examination" of John Grisham's *The Chamber* and Polly Nelson's *Defending the Devil: My Story as Ted Bundy's Last Lawyer ("Defending the Devil")*, the United States District Court for the District of Columbia determined that the two works were not "substantially similar" in their protectible expression and granted summary judgment for Respondents. That decision and the one-paragraph *per curiam* affirmance by the United States Court of Appeals for the District of Columbia Circuit reflect the application of well-established standards of copyright law. There is no conflict among the Circuits regarding those standards and no special or important reason to grant the Petition under Supreme Court Rule 10.

STATEMENT OF THE CASE

This copyright infringement lawsuit arises from *The Chamber*, John Grisham's fifth bestselling novel. *The Chamber* was published by Doubleday and released for sale on May 25, 1994. Polly Nelson's autobiographical non-fiction work *Defending the Devil* was first sold nearly nine weeks later.[1]

Not surprisingly, then, Petitioner does not allege a single instance of verbatim copying of *Defending the Devil*. Her claim instead rests on a hodgepodge of purported similarities of general themes, plot ideas, settings, and isolated words and phrases. Petitioner detailed these "similarities" in hundreds of pages of self-serving charts, in which carefully selected words and phrases were wrenched out of context and, at times, rearranged, to give the illusion of similarity. The District Court properly paid little heed to these materials, questioning their utility and veracity. *See Nelson v. Grisham*, 942 F. Supp. 649, 653 and n.2 (D.D.C. 1996), *aff'd*, 1997 U.S. App. LEXIS 28515 (D.C. Cir. 1997). An "expert's affidavit," which did little more than regurgitate the "similarities" set out in Petitioner's charts, also failed to impress the court. *Id.* at 652-53 and n.2.

Petitioner was forced to rely on these misleading, interpretative, secondary materials because the actual works at issue — *The Chamber* and *Defending the Devil* — are nothing alike. *Defending the Devil* is a stark work of non-fiction that methodically and chronologically portrays the vagaries of death penalty litigation. The people, places, and events depicted are real. As the District Court noted, Petitioner simply "memorialized her three-year-long involvement in the representation of death row inmate Ted Bundy." *Nelson*, 942 F. Supp. at 650. In essence,

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1. Oddly, in this case the allegedly infringing work was published **before** the work it purportedly infringed. Although Petitioner's submissions below sought to compare the texts of the two *published* works, her complaint alleged that Mr. Grisham copied from an 80-page *unpublished* proposal entitled *Peace, Ted*. Petitioner later reversed field, contending that Mr. Grisham copied from a 420-page draft of *Defending the Devil* entitled *Death is Different*.

Regardless of which of these works Petitioner now claims was pilfered, Ms. Nelson never offered any evidence that Mr. Grisham or his editor saw any version of *Defending the Devil* before publication of *The Chamber*. In fact, Mr. Grisham has expressly denied ever hearing of Ms. Nelson or her book prior to this lawsuit. Jt. App. 54-57. It is shocking, then, that Petitioner — without record support — now suggests that there is "evidence that [Mr. Grisham] in fact had a draft of Nelson's book in hand while writing *The Chamber*." Petition for Writ of Certiorari ("Pet. for Cert."), at 10. No such evidence exists; in fact, the only evidence in the record reflects just the opposite. In any event, the matter of access is not before the Court on this appeal.

Defending the Devil is a personalized news report about the twists and turns of Ted Bundy's post-conviction legal maneuvering.[2]

The Chamber, in contrast, "tells a much more personal story." *Nelson*, 942 F. Supp. at 654. It is the fictional tale of Adam Hall, a young man with a single-minded purpose: to understand and defend not just a condemned death row inmate, but his grandfather. The story takes place in less than a month, using traditional literary devices such as flashbacks and foreshadowing to unravel nearly 30 years of Adam's dark family history. *Id.* at 651. *The Chamber's* complex characters, exploration of familial relationships, haunting portrayal of racial discord in the South, and attention to descriptive detail — qualities lacking in *Defending the Devil* — strike a familiar chord with fans of Mr. Grisham's body of work.

Two courts now have reviewed these books and concluded that they are not similar, let alone substantially similar. Consistent with well-settled precedent, the District Court carefully examined the "concept and feel," plot, setting, time line, and characters of both works, in each case concluding that Petitioner's alleged similarities were "inaccurate," "simply not similarities," or involved unprotectible themes, plots, and settings. *Nelson*, 942 F. Supp. at 653-56. Holding that the books were not at all similar in their protectible expression, the court granted summary judgment for Respondents and dismissed the case. *Id.* at 656. The D.C. Circuit agreed.[3]

Dissatisfied with the results below, Petitioner seeks a third bite at the apple. Other than her belief that the lower courts reached an unjust decision, however, Petitioner offers no reason why this Court should re-examine these issues. The Petition should be denied.

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2. *Defending the Devil* is so rooted in real events and court proceedings that nearly 100 of its 336 pages consist of verbatim transcripts interspersed with a smattering of commentary. *See Defending the Devil*, at 177-250, 275-300.

3. The D.C. Circuit's one-paragraph *per curiam* opinion stated simply that "the district court's decision [is] affirmed substantially for the reasons set forth in the district court memorandum opinion." *Nelson v. Grisham*, 1997 U.S. App. LEXIS 28515 (D.C. Cir. 1997).

REASONS FOR DENYING THE WRIT

THE LOWER COURTS PROPERLY APPLIED THE RELEVANT STANDARDS OF COPYRIGHT LAW AND OPINIONS OF THIS COURT.

Petitioner entreats this Court to safeguard copyright protection for works of "introspective non-fiction,"[4] protection which she claims is threatened by the District Court's decision. In fact, that opinion faithfully adhered to this Court's statements on the scope of copyright protection for fact-based works. It recognized that non-fiction works such as Ms. Nelson's "receive[ ] equal protection under the copyright laws." *Nelson*, 942 F. Supp. at 656. At the same time, it underscored the reality that "often in non-fiction works there are many uncopyrightable elements." *Id.* Far from diluting copyright protection for non-fiction works, the District Court simply refused to grant to Petitioner the "monopoly on the stories of young attorneys who represent inmates on death row" that she sought. *Id.*

A. Copyright Protects Only Original Aspects Of Non-Fiction Works.

Originality is the linchpin of copyright. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345-46 (1991). To merit copyright protection, "a work must be original to the author." *Id.* at 345 (citing *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 547-49 (1985)); 17 U.S.C. § 102(a) (copyright subsists in "original works of authorship"). The fact that a work as a whole is copyrightable "does not mean that every element of the work may be protected." *Feist*, 499 U.S. at 348. Rather, only those aspects of the work that are original to the author are protectible. *Id.*; *Harper & Row*, 471 U.S. at 547 ("[C]opyright is limited to those aspects of the work — termed 'expression' — that display the stamp of the author's originality.").

The originality requirement means that facts and ideas contained in otherwise copyrightable works are not protected by copyright. *Feist*, 499 U.S. at 345; *Harper & Row*, 471 U.S. at 547; *Mazer v. Stein*, 347 U.S. 201, 217 (1954) ("[P]rotection is given only to the expression of the idea — not the idea itself."); *CCC Info. Serv., Inc. v. MacLean Hunter Mkt. Reports*, 44 F.3d 61, 68 (2d Cir. 1994), *cert. denied*, 516 U.S. 817 (1995); *Shaw v. Lindheim*, 919 F.2d 1353, 1356 (9th

4. In an attempt to make *Defending the Devil* seem more akin to *The Chamber* and to expand the limited copyright protection given to non-fiction works, Petitioner invents this new genre of non-fiction. Her newly-minted moniker cannot provide those works with greater (or lesser) copyright protection than they currently enjoy.

Cir. 1990). Facts and ideas are excluded from protection because they do not "owe their origin to an act of authorship." *Feist*, 499 U.S. at 347. Therefore, "facts may be copied at will" and subsequent authors may "build freely upon the ideas and information conveyed by a work." *Id.* at 350 (citing *Harper & Row*, 471 U.S. at 556-57).

This principle "severely limits" the scope of protection for fact-based non-fiction works and has important implications for this case. *Feist*, 499 U.S. at 350. As stated by the Second Circuit, "absent wholesale usurpation of another's *expression*, claims of copyright infringement where works of history are at issue are rarely successful." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.) (emphasis added), *cert. denied*, 449 U.S. 841 (1980); *Nash v. CBS, Inc.*, 899 F.2d 1537, 1541 (7th Cir. 1990); *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir.), *cert. denied*, 476 U.S. 1159 (1986); *Alexander v. Haley*, 460 F. Supp. 40, 44-45 (S.D.N.Y. 1978). Petitioner's book is such a work of history — a factual narrative that "takes the reader through three years worth of appeals, from the daily grind of working on a capital case to the actual court hearings." *Nelson*, 942 F. Supp. at 654.

Simply put, the historical events that constitute the bulk of *Defending the Devil* — the facts of Ms. Nelson's and Ted Bundy's lives, the actions and emotions of the lawyers involved, the activities of politicians, prison officials, and journalists, and the exhaustive minutiae of death penalty litigation — are real, and Petitioner has no claim to their exclusive use.[5] As a result, even if Mr. Grisham had seen *Defending the Devil* prior to writing *The Chamber*, which he did not, he would have "had the right 'to avail himself of the facts contained' [therein] and to 'use such information . . . in his own literary work.'" *Hoehling*, 618 F.2d at 979 (quoting *Greenbie v. Noble*, 151 F. Supp. 45, 67 (D.N.Y. 1957). *See also Walker*, 784 F.2d at 49; *Feist*, 499 U.S. at 349 ("the very same facts and ideas may be divorced from the context imposed by the author, and restated or reshuffled by second comers") (quoting Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, 90 COLUM. L. REV. 1865, 1868 (1990)).

In addition to excluding facts and ideas, the originality requirement also dictates that general themes, settings, and characters are outside the

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5. Examples of fictionalized accounts of historical events abound in American literature and popular culture. Gore Vidal's *Lincoln*, Don DeLillo's *Libra*, and Norman Mailer's *The Executioner's Song* are all fictionalized accounts of real events. The popular television drama *Law and Order* regularly uses actual crimes as the basis for its fictional storylines. Under Petitioner's theory of copyright, each of these fictional works would be "infringements" of the underlying historical facts.

scope of copyright protection. *See, e.g., Nash*, 899 F.2d at 1543; *Walker*, 784 F.2d at 48-50; *Berkic v. Crichton*, 761 F.2d 1289, 1293 (9th Cir.), *cert. denied*, 474 U.S. 826 (1985). The rationale for the exclusion of these categories was first articulated by Judge Learned Hand:

> Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931). In *Nichols*, the Second Circuit affirmed summary judgment for the defendant because the only similarity between two plays was the common theme of "conflicts between Irish and Jews, into which the marriage of the children enters," an idea "too generalized" to be protected. *Id.*

This "idea-expression dichotomy" also explains why so-called *scenes a faire* — "situations and incidents which flow naturally from a basic plot premise" — are not protected by copyright. *Berkic*, 761 F.2d at 1293. *See Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996). Like facts and ideas, *scenes a faire* are not "original" to the author because they "flow naturally from the work's theme rather than the author's creativity." *Williams*, 860 F. Supp. at 167.

Cases applying the *scenes a faire* doctrine are legion. In *Alexander v. Haley*, for example, the court found that attempted escapes, flights through the woods pursued by baying dogs, the sorrowful or happy singing of slaves, the atrocity of the buying and selling of human beings, the sale of slave children, the horrors of punitive mutilation, and slave owners complaining about the high price of slaves were unprotectible *scenes a faire* in works about slavery. 460 F. Supp. at 45. Likewise, "[e]lements such as drunks, prostitutes, vermin, and derelict cars would appear in any realistic work about the work of policemen in the South Bronx." *Walker*, 784 F.2d at 48-50. *See also Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 463 (11th Cir.) (idea of a mosque-style palace with minarets unprotectible in a story about Arabian or African royalty), *cert. denied*, 513 U.S. 1062 (1994); *Hoehling*, 618 F.2d at 979 (scenes in beer hall, singing of the German national anthem, and German greetings to be expected in books about

Hindenburg disaster); *Evans v. Wallace Berrie & Co.*, 681 F. Supp. 813, 817 (S.D. Fla. 1988) (sand dollars as currency, foods made from seaweed, seahorses for transportation, and plates made of oyster or mother of pearl attributable to common theme of an underwater civilization). In each of these cases, the courts properly concluded that such stock scenes were simply too common to be copyrighted.

Here, too, the District Court concluded that many of the "similarities" alleged by Petitioner were the natural result of the death penalty backdrop of both books. For example, "the presence of the media, politicians, and jail house personnel" and the "frenzy with which last minute appeals are made by both attorneys" were dismissed as stock events in books about death penalty litigation. *Nelson*, 942 F. Supp. at 653. Likewise, the emotions experienced by the protagonists and the condemned prisoners would be "expected" in such works. *Id.* at 655. Since Mr. Grisham "did not copy any unique expressions of Nelson," there can be no infringement. *Id.* at 653.

Recognizing the disastrous impact of the *scenes a faire* doctrine on her case, Petitioner makes an impassioned plea for its reversal. She argues that Respondents should not be allowed to rely on the *scenes a faire* doctrine unless they identify a specific "genre" to which both books belong. Putting aside the obvious fact that the genre here is literature addressing capital punishment, Petitioner does not identify a single case supporting her new requirement. The law simply does not require that library shelves overflow with books of a particular genre before the *scenes a faire* doctrine can apply. *See Hoehling*, 618 F.2d at 979; *Zambito v. Paramount Pictures Corp.*, 613 F. Supp. 1107, 1111 (E.D.N.Y.), *aff'd mem.*, 788 F.2d 2 (2d Cir. 1985). The *scenes a faire* doctrine — without the new, unnecessary layer of complexity Petitioner seeks to graft to it — is no more than the logical extension of the bedrock principle that only an author's original expression is copyrightable.

Throughout this lawsuit, Petitioner has refused to accept even the most basic principles of copyright law, including the fundamental difference between uncopyrightable facts and ideas and her expression of them. The District Court, of course, recognized that Petitioner's "expression of her experiences receives protection under the law." *Nelson*, 942 F. Supp. at 656. *See Harper & Row*, 471 U.S. at 548 (President Ford's "original form of expression" of historical events is protectible). But Petitioner seeks much more. She would preserve for her exclusive use not just her expression of her experiences, but the experiences themselves. The courts below properly refused to grant Petitioner such a monopoly over historical events. This Court should do the same.

B. The District Court's Substantial Similarity Inquiry Was Proper.

In *Feist*, this Court reiterated the well-established test for copyright infringement. To succeed, a plaintiff must prove (1) ownership of a valid copyright[6] and (2) copying of *original* elements of her work by the defendant. *Feist*, 499 U.S. at 361 (emphasis added). *See Television Digest v. United States Tel. Ass'n*, 841 F. Supp. 5, 7 (D.D.C. 1993) (citation omitted); *Williams*, 84 F.3d at 587; *Dr. Seuss Enterprises, L.P. v. Penguin Books USA*, 109 F.3d 1394, 1398 (9th Cir.), *cert. dismissed*, __ U.S. __, 118 S. Ct. 27 (1997). Where, as here, a plaintiff cannot provide direct evidence of copying, she must establish that the defendant had access to her work[7] and that the two works are substantially similar. *McCall v. Johnson Publishing Co.*, 680 F. Supp. 46, 48 (D.D.C. 1988); *Williams*, 84 F.3d at 587; *Beal*, 20 F.3d at 459 (citation omitted).

Petitioner claims that the District Court erred by examining only the "protectible elements" of *Defending the Devil* in its substantial similarity analysis and by "ignor[ing] other evidence of copying." Pet. for Cert., at 7 & 9. She contends that the court instead should have examined whether *any* part of her work, including its uncopyrightable elements, was copied, and then analyzed whether that copying was of protectible or unprotectible elements. *Id.* at 7. Had the latter approach been followed, claims Petitioner, other evidence "probative of copying" would have been considered. *Id.* at 9.[8]

Petitioner's proposed approach fails for many reasons. Petitioner's contention that courts should examine whether a defendant copied noncopyrightable elements of the plaintiff's work

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6. Petitioner misrepresents the record when she states that Respondents have "conceded" her possession of a valid copyright in *Defending the Devil*. For purposes of their motion for summary judgment, Respondents agreed not to contest the validity of her copyright. Respondents did not, however, agree that the copyright was valid, primarily because Ms. Nelson failed to disclose the numerous uncopyrightable elements of the book on her copyright registration form. *See Masquerade Novelty v. Unique Indus.*, 912 F.2d 663, 667-68 and n.5 (3d Cir. 1990); *GB Mktg. USA, Inc. v. Gerolsteiner Brunnen GmbH & Co.*, 782 F. Supp. 763, 774-75 (W.D.N.Y. 1991).

7. The question of access is not at issue on this appeal. Early in this case, the parties agreed not to conduct discovery on the issue of access until after the District Court's ruling on Respondents' motion for summary judgment. The court's ruling obviated the need for that discovery.

8. Petitioner has apparently dropped her earlier contention that summary judgment is improper in copyright cases. Courts in every Circuit routinely determine substantial similarity as a matter of law and award summary judgment. *See, e.g., McCall*, 680 F. Supp. at 49; *Williams*, 84 F.3d 581; *Beal*, 20 F.3d 454; *Berkic*, 761 F.2d 1289; *Segal v. Paramount Pictures*, 841 F. Supp. 146 (E.D. Pa. 1993), *aff'd mem.*, 37 F.3d 1488 (3d Cir. 1994).

in determining whether the works are substantially similar is contrary to *Feist's* holding that copyright protection is limited to those parts of a work that are original to the author. *Feist*, 499 U.S. at 348; *Harper & Row*, 471 U.S. at 547. The District Court's inquiry into whether *The Chamber* copied the "protected elements" of *Defending the Devil* thus represents no more than the routine application of *Feist's* rule that a plaintiff must show copying of "constituent elements [of the work] that are original." *Feist*, 499 U.S. at 361.

Every Circuit that has reached this issue has agreed that, in determining whether two works are substantially similar, only protected elements of the plaintiff's work should be examined. *See, e.g., Dr. Seuss*, 109 F.3d at 1398-99; *Williams*, 84 F.3d at 587; *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807, 813 (1st Cir. 1995), *aff'd per curiam*, 516 U.S. 233 (1996); *Engineering Dynamics, Inc. v. Structural Software, Inc.*, 26 F.3d 1335, 1340-41 (5th Cir. 1994); *Beal*, 20 F.3d at 458-59; *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 508-09 (7th Cir. 1994); *Gates Rubber Co. v. Bando Chem. Indus.*, 9 F.3d 823, 831-33 (10th Cir. 1993).

The Ninth Circuit — where Petitioner erroneously looks for support — is no exception.[9] Recent decisions of that court make clear that the so-called "extrinsic test" of substantial similarity is actually a means "to determine the scope of copyright protection before works are considered as a whole." *Apple Computer, Inc. v. Microsoft Corp.*, 35 F.3d 1435, 1443 (9th Cir. 1994), *cert. denied*, 513 U.S 1184 (1995). *See Pasillas v. McDonald's Corp.*, 927 F.2d 440, 443 (9th Cir. 1991) (copyright holder cannot rely on noncopyrightable "standard elements" to show infringement); *Harper House, Inc. v. Thomas Nelson, Inc.*, 889 F.2d 197, 207-08 (9th Cir. 1989) (trier of fact must eliminate unprotectible aspects of plaintiff's work from infringement inquiry). Thus, the Ninth Circuit, too, has clarified that courts should examine only whether the *protectible* elements of an allegedly infringed work were copied. *See Dr. Seuss*, 109 F.3d at 139 (affirming preliminary injunction where district court eliminated uncopyrightable elements from comparison of works). Significantly, the court noted that its

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9. The Ninth Circuit traditionally used a two-step approach to evaluate substantial similarity. In *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157 (9th Cir. 1977), for example, the two works were subjected to an "extrinsic test" which examined whether they were substantially similar in their "general ideas." *Berkic*, 761 F.2d at 1292 (citing *Krofft*, 562 F.2d at 1164). Only if the works were similar at that level did the Court examine whether there was substantial similarity in the expression of those ideas. *Id.* To prevail, the plaintiff was required to show substantial similarity of *both* ideas and expression. *Id.*

traditional two-step approach was modified in order to "bring[ ] it more in line with the test followed in other circuits." 109 F.3d at 1398.

This case finds no split in the Circuits and offers no issue beyond the routine application of basic principles of copyright law. This is hardly the kind of landscape that merits tending by this Court.

CONCLUSION

From the start, this case has presented a simple question: whether *The Chamber* and *Defending the Devil* are substantially similar works. After an exhaustive review of both books, the District Court answered that question in the negative, finding that no amount of zealous advocacy "can[ ] create substantial similarity where none exists." *Nelson*, 942 F. Supp. at 656. The D.C. Circuit agreed. Petitioner has advanced no reason to disturb these unremarkable conclusions or the rudimentary principles of copyright law that compelled them.

For the foregoing reasons, Respondents John Grisham and Bantam Doubleday Dell Publishing Group, Inc. respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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